Supreme Court, U.S.
FILED

97 791 OCT 28 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term 1997

ROBERT P. BURCH,

Petitioner,

v.

THE COCA-COLA COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Jennifer Judin
Counsel of Record
DOWNS, JUDIN & STANFORD, P.C.
501 Elm Place, Suite 200
Dallas, Texas 75202
214/748-7900
Fax: 214/748-4530
Attorneys for Petitioners

Appellate Service: Curry & Taylor (800) 222-8738

QUESTIONS PRESENTED

1. Whether an employee whose disability is alcoholism must demonstrate a permanent secondary impairment to be protected under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12102(2)?

2. Whether an employer is relieved of its duty to reasonably accommodate under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) when the employee's disability substantially limits a major life activity other than working?

3. Whether leave for treatment is a reasonable accommodation under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 13

I. THE FIFTH CIRCUIT'S OPINION THAT AN EMPLOYEE WITH THE DISABILITY OF ALCOHOLISM MUST SHOW A PERMANENT SECONDARY IMPAIRMENT CONFLICTS WITH THE OPINIONS OF ALL OTHER CIRCUIT COURTS DECIDING CASES UNDER THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT. 14

II. THE FIFTH CIRCUIT'S OPINION THAT AN EMPLOYEE'S DISABILITY MUST IMPAIR THE MAJOR LIFE ACTIVITY OF WORKING BEFORE AN EMPLOYER'S DUTY TO REASONABLY ACCOMMODATE IS TRIGGERED UNDER THE AMERICANS WITH DISABILITIES ACT IS CONTRARY TO THE OPINIONS OF OTHER CIRCUIT COURTS. 22

III. THE FIFTH CIRCUIT'S OPINION THAT A REQUEST FOR LEAVE FOR TREATMENT IS NOT A REQUEST FOR AN ACCOMMODATION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUIT COURTS. 26

IV. THE DECISION OF THE FIFTH CIRCUIT IS ERRONEOUS. 28

V. THE QUESTIONS PRESENTED ARE IMPORTANT. 29

CONCLUSION 30

CERTIFICATE OF SERVICE 31

APPENDIX

Opinion Of The Circuit Court 1a

District Court Judgment 49a

TABLE OF AUTHORITIES

Cases

Altman v. New York City Health and Hosp. Corp., 100 F.3d 1054 (2nd Cir. 1996) 17, 19

Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994). 17

Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993) 14, 25

Butler v. Thornburgh, 900 F.2d 871 (5th Cir. 1990), cert denied, 498 U.S. 998, 111 S.Ct. 555, 112 L.Ed.2d 562 (1990) 18

Crewe v. United States Office of Personnel Management, 834 F.2d 140 (8th Cir. 1987) 17

Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) 17

Fuller v. Frank, 916 F.2d 558 (9th Cir. 1990) 18, 27

Homeyer v. Stanley Tulchin Associates, Inc., 91 F.3d 959 (7th Cir. 1996) 14, 23

Leary v. Dalton, 58 F.3d 748 (1st Cir. 1995) 18

Little v. Federal Bureau of Investigation, 1 F.3d 255 (4th Cir. 1993) 18

Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995) 17, 18

McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992) 14, 24

Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997) 17

Newland v. Dalton, 81 F.3d 904 (9th Cir. 1996) 17, 19

Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996) 14, 17, 27

Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989) 18, 27

School Board of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 1127 L.Ed.2d 307 (1987) 11, 21

Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir. 1980) 17

Stone v. City of Mount Vernon, 118 F.3d 92 (2nd Cir. 1997) 22

Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2nd Cir. 1991) 18

Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985) 17

Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996) 18

Other Authorities

EEOC Technical Assistance on Title I of ADA 19

EEOC Compliance Manual, Vol. 2 21

H.R. REP. NO. 485, 101st Cong., 2d Sess. (1990) 13, 19, 26

S. REP. NO. 116, 101st Cong., 1st Sess. (1989) 13, 16, 19, 26

Wendy K. Voss, Note, Employing the Alcoholic Under the Americans With Disabilities Act of 1990, 33 Wm. & Mary L. Rev. 895 (1992) 29

Wendy Wilkinson, Judicially Crafted Barriers To Bringing Suit Under the Americans With Disabilities Act, 38 S. Tex. L. Rev. 907 (1997). 29

Rules and Regulations

29 C.F.R. § 1630 15

29 C.F.R. § 1630.2(h) 2, 16

29 C.F.R. § 1630.2(i) 3, 16

29 C.F.R. § 1630.2(j) 3, 16

29 C.F.R. § 1630.2(o)(2) 3

29 C.F.R. § 1630.9(a) 4

29 C.F.R. § 1630, App. 1630.2(o) 23, 27

45 C.F.R. § 84.12(a) 22

Fed. R. Civ. P. 50 5

Statutes

28 U.S.C. § 1254(1) 1

29 U.S.C. § 706(a)(B) 16

29 U.S.C. § 791 13

29 U.S.C. § 793 13

29 U.S.C. § 794 13

42 U.S.C. § 12101-12113 4
42 U.S.C. § 12101(a)(4) 13
42 U.S.C. § 12101(a)(8) 13
42 U.S.C. § 12102(2) 2, 15
42 U.S.C. § 12102(2)(B) 11, 21
42 U.S.C. § 12111(8). 15
42 U.S.C § 12111(9)(B) 26
42 U.S.C. § 12112(a) 1, 14
42 U.S.C. § 12112(b) 1
42 U.S.C § 12112(b)(5)(a) 1, 22
42 U.S.C. § 12114(c)(4). 19
42 U.S.C. § 12201. 28

Robert P. Burch respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-48a) is reported at 119 F.3d 305.

JURISDICTION

The Court of Appeals entered its Judgment on July 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The Americans With Disabilities Act, 42 U.S.C. § 12112 states:

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the

term "discriminate" includes:

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

The Americans With Disabilities Act, 42 U.S.C. § 12102(2) states that the term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) A record of such impairment; or
(C) Being regarded as having such an impairment.

The implementing regulations of the Equal Employment Opportunity Commission (EEOC) for Title I of the Americans With Disabilities Act, 29 C.F.R § 1630.2(h), define "physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

disabilities.

The EEOC's implementing regulations, 29 C.F.R. § 1630.2(i), define and interpret "major life activities" as follows:

> (i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The EEOC's implementing regulations, 29 C.F.R. § 1630.2(j), define and interpret "substantially limits" as follows:

> (1) The term substantially limits means:
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The EEOC's implementing regulations, 29 C.F.R. § 1630.2(o)(2), interpret "reasonable accommodation" as follows:

> (2) Reasonable accommodation may include but is not limited to:
> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provisions of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

The EEOC's implementing regulations, 29 C.F.R. § 1630.9(a), further state as follows:

> (a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

STATEMENT OF THE CASE

Petitioner, Robert P. Burch, an individual with a disability of alcoholism, sued his former employer, Respondent, The Coca-Cola Company, for violations of the Americans With Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101-12213 (1994), because it fired him while on leave for treatment for his alcoholism. Petitioner claimed that Respondent (1) intentionally discriminated against him by terminating him because of his disability and (2) discriminated against him by failing to provide a reasonable accommodation for his disability by not allowing Petitioner to take a leave of absence for treatment for his alcoholism and return to work after his treatment was complete.

The case was tried to a jury in the United States District Court, Northern District of Texas, Dallas Division, with United States Magistrate Judge Jeff Kaplan presiding. At the close of Petitioner's case, the Magistrate Judge granted Respondent's oral motion for judgment as a matter of law under Fed. R. Civ. P. 50 on Petitioner's intentional discrimination claim. This ruling was premised on the fact that Petitioner's evidence did not establish a prima facie case of intentional discrimination since he had presented no evidence that he was replaced by someone who was not disabled. The case was submitted to the jury on Petitioner's claim that Respondent discriminated against Petitioner by failing to provide a reasonable accommodation. The jury found that Respondent violated the ADA and awarded Petitioner actual and punitive damages.[1] The trial court entered Judgment for Petitioner. App., *infra*, 49a-50a.

Both Petitioner and Respondent appealed to the Fifth Circuit Court of Appeals.[2] The Fifth Circuit reversed the judgment holding, in pertinent part, that (1) Petitioner's

[1] In the largest jury verdict in an ADA case to date, the jury awarded actual and punitive damages totaling $7,109,000.00. The trial court significantly reduced the damages awarded to Petitioner, decreasing the front pay award, as well as the punitive damage award to comply with the statutory caps on compensatory and punitive damages.

[2] Petitioner appealed the trial court's dismissal of Petitioner's intentional discrimination claim. The Fifth Circuit did not reach the substance of the trial court's dismissal, as they affirmed this ruling by concluding that Petitioner did not meet the statutory definition of disability under the ADA. App., *infra*, 34a.

alcoholism was not an actionable disability under the ADA; (2) Respondent had no duty to provide a reasonable accommodation to Petitioner because his disability did not interfere with his ability to perform the essential functions of his job; and (3) Petitioner's request for leave to obtain treatment for his alcoholism was not a request for an accommodation under the ADA. App., *infra,* 15a.

I. The Disability

In 1989, Petitioner was recruited by Respondent and left a 24 year career with General Electric to become the Southwest Area Service Manager for Respondent's fountain division in Dallas, Texas. Petitioner was responsible for the installation and service of fountain machines in a vast multi- state area and supervised approximately twenty employees. During his employment, Petitioner was considered very technically astute, consistently evaluated highly, and received substantial pay raises, stock options and bonuses each year. However, all of Petitioner's written performance evaluations noted "working relationships" as a developmental area in which he should focus in each upcoming year. An important part of Petitioner's job was to manage and maintain good working relationships with others.

In May 1992, Petitioner was having problems with personal relationships outside of work and also experiencing emotional problems. He began receiving counseling from Cynthia Maddox, a clinical social worker with Respondent's Employee Assistance Program. Although Maddox thought that Petitioner's drinking was abnormal, she did not counsel him for alcohol abuse or

recommend treatment for him. During this time, Petitioner began to suspect he had an alcohol problem. He unsuccessfully began trying to control his drinking and began avoiding work and social situations where he normally drank. When Petitioner's problems did not improve by February 1993, he asked Maddox for a referral to a psychiatrist.

Petitioner then saw Dr. Joel Holiner who, after one visit, diagnosed Petitioner as suffering from "adjustment disorder with depressed mood" and "probable alcohol abuse." Dr. Holiner referred Petitioner to Marcelo Matamoros, MSW-ACP, for therapy. Although Petitioner's drinking had accelerated and Matamoros was cognizant of his alcohol problem, the primary focus of Matamoros' treatment of Petitioner was with his depression. As is common in alcoholics, Petitioner was resistant to deal with his alcohol problem.

Petitioner's drinking began at the age of 14. His drinking accelerated through the years. He was arrested for driving while intoxicated in 1986 and has had four failed marriages. Although Petitioner did not drink during working hours, he got drunk almost every night. Further, alcohol was an important part of Respondent's culture with alcohol served at all after 5:00 p.m. functions. Also, prior to seeing Maddox, Petitioner often drank after hours with other managers and superiors. For some time prior to seeking inpatient rehabilitation on September 26, 1993, at the age of 47, Petitioner had lost the ability to control the amount he drank. He had blackouts when drinking and suffered from insomnia and depression. Petitioner avoided interaction with people at work in the mornings, isolated himself in his office, and would tell co-workers "he wasn't a morning person."

Petitioner "hit bottom" with his disease in September 1993 after a work-related incident. Petitioner attended an Area Service Manager's meeting in Atlanta, Georgia. Following the meeting, there was a cocktail hour and company-sponsored dinner with alcohol served. Petitioner, who had been drinking, felt he had been unduly harassed all day long by two other managers who he used to drink with before avoiding work-related drinking outings. He engaged in a nonphysical confrontation when he mouthed obscenities at one of them. Petitioner began to question his behavior when drinking and finally realized he needed help. Matamoros' office arranged for Petitioner to enter treatment.

On September 25, 1993, the day before entering treatment, Petitioner called his supervisor, Perry Cutshall, to advise him that he was going into treatment. Cutshall told Petitioner to "do what he needed to do." Petitioner checked into Charter Hospital on September 26, 1996.

Dr. Edgar Nace, a board certified psychiatrist with a sub-specialty in addiction psychiatry, evaluated Petitioner upon entering Charter Hospital and diagnosed him as suffering from "alcohol withdrawal syndrome, alcohol dependence and possible depression." Petitioner was prescribed Librium for alcohol withdrawal syndrome and anti-depressants for depression.

Petitioner responded well to treatment and, with Dr. Nace's approval, Petitioner asked to return to work half days on October 6, 1993. Petitioner's supervisor, Cutshall, told Petitioner that he was suspended and could not return to work. On October 27, 1996, Petitioner

wrote Respondent asking to return to work immediately. Dr. Nace and Matamoros also wrote letters indicating that Petitioner could return to work and would be an improved employee. Instead, on November 4, 1993, one day before he was discharged from treatment, Petitioner was told that his employment was terminated for "performance issues". Respondent made this decision without following its own progressive disciplinary procedures. Petitioner was discharged from Charter Hospital the next day, November 5, 1993. He has not taken a drink of alcohol since entering Charter Hospital and has regularly attended meetings of Alcoholics Anonymous.

Petitioner's physician, Dr. Nace, testified at trial that Petitioner, like other alcoholics, was "powerless" to control his use of alcohol when he was actively addicted, before treatment. Dr. Nace also explained the difference between alcoholism and alcohol abuse as the loss of the ability to control how much one drinks. He further testified that alcoholism is a progressive disease and that he estimated that Petitioner's drinking had crossed over into alcoholism approximately ten years earlier. Dr. Nace testified that alcoholism is a permanent condition for which there is no cure; that the only way to recover is to stop drinking, but a person is still an alcoholic after he stops drinking. It was Dr. Nace's opinion that Petitioner was disabled under the definition set out in the ADA: that he had a physical or mental impairment that substantially limited a major life activity.

In reversing the judgment for Petitioner, the Fifth Circuit held, as a matter of law, that Petitioner's alcoholism did not substantially limit any major life activity. App., *infra*, 15a. The Fifth Circuit equated the

effects of Petitioner's alcoholism to "an overindulging social drinker", referring to it as a "temporary affliction". App., *infra*, 20a. The Fifth Circuit stated:

> "That [Petitioner's] inebriation was temporarily incapacitating is not determinative. [Petitioner] produced no evidence that the effects of his alcoholism-induced inebriation were qualitatively different that those achieved by an overindulging social drinker: in both situations, the natural result of overindulgence is the temporary impairment of senses, dulled reactions and the prospect of a restless sleep followed by an unpleasant morning." App., *infra,* 20a.

The Fifth Circuit also stated:

> " [Petitioner's] testimony that his inebriation was frequent does not make it a permanent impairment. Permanency, not frequency, is the touchstone of a substantially limiting impairment. Although [Petitioner's] alcoholism may have been permanent, he offered no evidence that he suffered from any substantially limiting impairment of any significant duration. App., *infra*, 21a.

Then, departing further from established precedent, the Fifth Circuit held that for an alcoholic to be protected under the ADA, he must demonstrate, in addition to alcoholism, an additional permanent impairment caused by the alcoholism:

> "This is not to say that an alcoholic can never demonstrate a substantially limiting impairment. But where, as here, an alcoholic's only proffered

> impairments are the primary result of temporary inebriation, such proof is insufficient. [Petitioner] offered no testimony that his alcoholism-induced inebriation permanently altered his gait, his ability to speak properly, his memory when sober or produced long term insomnia." App., *infra*, 21a, fn 9.

The Fifth Circuit also rejected Petitioner's hospitalization for his alcoholism as a "record of impairment" to establish he was disabled under the second prong of the definition of disability under the ADA, 42 U.S.C. § 12102(2)(B). In so doing, the Fifth Circuit rejected this Court's language in *School Board of Nassau County v. Arline*, 480 U.S. 273, 279-81, 107 S.Ct. 1123, 1127, 94 L.Ed.2d 307 (1987) that an impairment serious enough to require hospitalization is "a fact more than sufficient to establish that one or more [of her] major life activities were substantially limited by [her] impairment." *Id.* The Fifth Circuit reasoned that as Petitioner's alcoholism did not substantially limit any major life activity, a record of treatment for his alcoholism was not a record of a substantially limiting impairment. App., *infra*, 22a.

II. Reasonable Accommodation

Petitioner's requested accommodation from Respondent was a request for leave for treatment of his alcoholism. Although Respondent allowed Petitioner to leave for treatment, it did not allow him to return to work after his treatment was complete.

The Fifth Circuit held that Petitioner "had advanced no cognizable request for accommodation". App., *infra*,

25a. They further held that as Petitioner's alcoholism did not affect his ability to perform the essential functions of his job, there was nothing for Respondent to accommodate. App., *infra*, 15a. In so holding, the Fifth Circuit rejected Petitioner's arguments, stating:

> "[Petitioner] argues that 'to be protected under the ADA, an individual need only show that a major life activity is substantially limited; there is no requirement that the individual also show that he is limited in the activity of working as well.' This is true insofar as [Petitioner] may assert a claim for intentional discrimination under the ADA. To assert a discrimination claim under the reasonable accommodation provision, however, [Petitioner] must demonstrate that a substantially limiting impairment somehow affected his ability to perform his job. Without such a showing, there would be nothing for an employer to accommodate." App., *infra*, 16a fn4.

The Fifth Circuit further held that Petitioner's request for leave for treatment, which included returning to work after the completion of treatment, was not a request for an accommodation.

> "[Petitioner] did not request an accommodation, he requested to return to his position as he left it when he entered treatment on September 26, 1993. He sought no changes to his position and desired nothing more than the ability to resume his career where he had left it." App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

In passing the ADA, Congress recognized the need to provide legal redress for individuals employed in the private sector who experience discrimination as a result of a disability, as well as to assure "equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(4) and (8).

Extending the prohibition of discrimination against persons with disabilities to private employers, Congress modeled the employment provisions of the ADA on the sections of the Rehabilitation Act of 1973, 29 U.S.C. § 791, 793-794 (1988), which proscribe employment discrimination in the federal sector. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt 2, at 2(1990); S. REP. NO. 116, 101st Cong., 1st Sess., at 2 (1989).

Under the Rehabilitation Act, alcoholism has always constituted a protected class of disability. With the enactment of the ADA, Congress extended many of the requirements developed under the Rehabilitation Act to the private employer, including the protection of alcoholics as disabled individuals and the duty of employers to reasonably accommodate them.

In a portentous deviation from the clear language of the statute and established precedent, the Fifth Circuit pummels three unintended burdens on an individual with a disability. First, the Court holds that for alcoholism to be an actionable disability under the ADA, an individual must demonstrate, in addition to his alcoholism, a permanent secondary impairment caused by the alcoholism. App., *infra*, 21a-22a. This decision conflicts

with all other circuit court cases dealing with alcoholics under both the Americans With Disabilities Act and the Rehabilitation Act.

Second, the Fifth Circuit holds that an employer has no duty to accommodate a disability which substantially limits a major life activity other than working. App., *infra,* 15a-16a, 25a-27a. This is in direct conflict with the decisions of the Seventh and Ninth circuits in *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959 (7th Cir. 1996); *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992); and *Buckingham v. U.S.*, 998 F.2d 735 (9th Cir. 1993), cases decided both under the ADA and the Rehabilitation Act.

Third, the Fifth Circuit holds that Petitioner's request for leave for treatment was not a request for an accommodation. App., *infra*, 28a-29a. This is in direct conflict with the Federal Circuit in *Office Of the Senate Sergeant At Arms v. Office Of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996), as well as cases decided under the Rehabilitation Act.

This Court has yet to grant a petition in an ADA case and this case presents a timely opportunity to provide guidance on the most litigated areas under the ADA: the definition of disability and the duty to reasonably accommodate. Further, the decision below is erroneous and the issues that it addresses are important.

I. What Is "Disability" Under the ADA?

The ADA protects a "qualified individual with a disability" from discrimination in all aspects of employment terms and conditions. 42 U.S.C. § 12112(a).

To understand who is protected, it requires one to sort through the statutory definitions in the Act and implementing regulations of the Equal Employment Opportunity Commission (EEOC), 29 C.F.R. § 1630 (1996). The ADA defines a "*qualified individual with a disability*" as:

> **"[a]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires..." 42 U.S.C. § 12111(8).**

"*Disability*" is defined in three ways as:

> **(A) a physical or mental impairment that substantially limits one or more of the life activities of such individuals;**
>
> **(B) a record of such an impairment; or**
>
> **(C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).**

Although the ADA provides no further definitions, the implementing regulations of the EEOC define "physical or mental impairment", "major life activities", and "substantially limits":

> **(h) *Physical or mental impairment* means:**
>
> **(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs),**

cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j).

The definition of disability under the ADA mirrors that of "handicap" in the Rehabilitation Act, 29 U.S.C. § 706(a)(B). Congress selected the term "disability" for the ADA rather than "handicap", not because of any difference in meaning, but because the former term is less stigmatizing to disabled persons. S. REP. NO. 116, at 21. The legislative history of the ADA indicates that Congress intended that the relevant case law developed under the

Rehabilitation Act be applicable to the term "disability" as used in the ADA. *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994).

Every other circuit court case which has dealt with the disability of alcoholism under the ADA and the Rehabilitation Act has treated, without question, or assumed, that a person suffering from the disease of alcoholism is an individual with a disability or a handicap. The very nature of the disease commands such treatment under both Acts. *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997) ("alcoholism qualifies as a disability for the purposes of the ADA"); *Maddox v. University of Tennessee*, 62 F.3d 843 (6th Cir. 1995) (assuming that an alcoholic is an individual with a disability under the ADA); *Altman v. New York City Health and Hosp. Corp.*, 100 F.3d 1054 (2nd Cir. 1996) (assuming alcoholic covered under the ADA); *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996) ("it is well-established that alcoholism meets the definition of a disability" under both the ADA and the Rehabilitation Act); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995) (alcoholism assumed to be a disability under the ADA and the Rehabilitation Act); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980) ("individuals with current problems or histories of alcoholism or drug abuse qualify as 'handicapped individuals' under the Rehabilitation Act"); *Crewe v. United States Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987) ("there can be little doubt that alcoholism is a handicap for the purposes of the [Rehabilitation] Act"); *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985) (holding that a recovered alcoholic is handicapped under the Rehabilitation Act); *Newland v.*

Dalton, 81 F.3d 904 (9th Cir. 1996) ("alcoholism is a recognized handicap" under the Rehabilitation Act); *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511 (2nd Cir. 1991) ("it is clear that substance abuse is a 'handicap' for purposes of the Rehabilitation Act"); *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989) ("alcoholism is a handicapping condition within the meaning of the [Rehabilitation] Act"); *Butler v. Thornburgh*, 900 F.2d 871 (5th Cir. 1990), cert denied, 498 U.S. 998, 111 S.Ct. 555, 112 L.Ed.2d 562 (1990) (alcoholic is a handicapped employee under the Rehabilitation Act); *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990) (alcoholism is covered handicap under the Rehabilitation Act); *Leary v. Dalton*, 58 F.3d 748 (1st Cir. 1995) (alcoholism is a disability within the meaning of the Rehabilitation Act); *Little v. Federal Bureau of Investigation*, 1 F. 3d 255 (4th Cir. 1993) ("It is settled that alcoholism is a handicapping condition within the meaning of the [Rehabilitation] Act"); *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996) (alcoholic is a disabled person within the meaning of the Rehabilitation Act).

In each of these cases involving an alcoholic employee, like this case, the employee's diagnosis of alcoholism was not disputed. Further, the evidence of impairment in many of these cases is similar or even less compelling than Petitioner's evidence. For example, the Sixth Circuit, in a case decided under both the ADA and the Rehabilitation Act, accepted as evidence of disability, an employee's prior arrests for driving a motor vehicle under the influence of alcohol and public intoxication, as well as treatment for alcoholism, even though the employee's drinking never affected his ability to perform his job and he never drank on the job. *Maddox*, 62 F.3d at 845. The

Second Circuit accepted as disabled under the ADA, a physician whose alcoholism was evidenced by periodic binges and drinking sprees, occurring mainly during weekends and vacations, who had undergone treatment and appeared drunk while treating a patient. *Altman*, 100 F.3d at 1055-1059. In the Ninth Circuit, an employee attempting to fire an assault rifle at individuals in a bar during a "drunken rampage" satisfied the definition of disability under the Rehabilitation Act. *Newland*, 81 F.3d at 905.

Congressional intent to provide protection for individuals with the disability of alcoholism is clear:

> "It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments... The term includes, however, such conditions, diseases and infections as: ..... alcoholism." S. REP. 116 at 22; H.R. REP. NO. 485 at 51.

The intent to include alcoholism as a disability is further evidenced in the ADA itself which states that employers are permitted to hold an alcoholic to the same qualification standards for employment or job performance and behavior that it holds other employees, even if any unsatisfactory performance or behavior is related to the alcoholism. 42 U.S.C. § 12114(c)(4).

The EEOC, in interpreting the definition of disability, states "[A] person who is an alcoholic is an 'individual with a disability' under the ADA." EEOC Technical Assistance on Title I of ADA at IV-8.2.

Despite the clear intent of Congress, the interpretations of the EEOC and established case law, the Fifth Circuit has decided that an active alcoholic, who has lost the ability to control his drinking, getting drunk almost every night, having blackouts, suffering insomnia, and in need of inpatient hospitalization, is not substantially limited in any major life activity. The Fifth Circuit now places a second, unprecedented requirement upon this class of protected persons, to show an additional permanent impairment caused by the alcoholism. App., *infra*, 21a fn 9. No other court has required this standard for an alcoholic to be protected under either the ADA or the Rehabilitation Act.

In so doing, the Fifth Circuit set forth examples of impairments that an alcoholic could show to meet the definition of disability: permanent alterations to gait, speech, memory, or long term insomnia. App., *infra*, 21a, fn 9. The Fifth Circuit's requirement of a permanent impairment is not contained in the ADA. Further, the EEOC attaches no such requirement:

> **"[T]he duration of an impairment does not, by itself, determine whether the impairment substantially limits an individual's major life activities. It is just one factor to be considered with all of the other relevant information...**
>
> *******
>
> **" Temporary impairments may be disabilities if they take significantly longer than normal to heal and significantly restrict the performance of major life activities during the healing period. Similarly, long-term impairments, or potentially long-term impairments of indefinite duration, may be disabilities if they are severe. Chronic conditions**

that are substantially limiting when active, and conditions with a high likelihood of recurrence in substantially limiting form also are disabilities." EEOC Compliance Manual, Vol. 2 § 902.4(d).

The Fifth Circuit further held that Petitioner did not satisfy the second statutory definition of disability under the ADA as he did not have a "record of impairment." 42 U.S.C. § 12102(2)(B). In so holding, the Fifth Circuit bootstrapped their reasoning that Petitioner's alcoholism did not substantially limit any major life activity to reach the result that Petitioner's record of hospitalization for his alcoholism was not a record of a substantially limiting impairment. Further, the Fifth Circuit rejected the application of this Court's decision in *School Board of Nassau County v. Arline*, which held that an employee who suffered from tuberculosis which required hospitalization 22 years earlier established that she had a "record of an impairment" within the meaning of the Rehabilitation Act. *Arline*, 480 U.S. at 279-81. App., *infra*, 22a.

The Fifth Circuit has ignored the impairments that the disease of alcoholism insults upon its victims. Instead, it equates an alcoholic to a "social drinker", effectively removing the disability of alcoholism from the protection of the ADA. The Fifth Circuit's opinion has far reaching consequences in future ADA cases. Not only alcoholics, but recovering substance abusers and any other persons with a physical or mental impairment which does not cause permanent symptoms, will not be considered disabled. For example, this opinion would prevent an epileptic (permanent impairment) who suffers frequent seizures (temporary afflictions) from being protected under the ADA.

II. When Must An Employer Accommodate?

As part of the national mandate for the elimination of discrimination against individuals with disabilities, Congress placed an affirmative duty upon private employers. Under the ADA, the term "discriminate" includes:

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; . . . 42 U.S.C §12112(b)(5)(A).

Regulations promulgated by the Department of Health and Human Services under the Rehabilitation Act require recipients of federal funds to "make reasonable accommodation to the known physical or mental limitations of an otherwise handicapped ... employee unless the recipient can demonstrate that the accommodation would impose an undue hardship ..." 45 C.F.R. § 84.12(a) (1996). The terms common to both the ADA and the Rehabilitation Act are to be interpreted the same way. *Stone v. City of Mount Vernon*, 118 F.3d 92, 96 (2nd Cir. 1997).

The EEOC's Interpretive Guidance on Title I of the ADA sets forth three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that

enable the employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. 29 C.F.R. § 1630, App. 1630.2(o).

The Fifth Circuit's analysis of the duty to reasonably accommodate focuses only on category (2) and rejects category (3) as a reason for providing an accommodation. The Fifth Circuit holds that an employer's duty to reasonably accommodate is only triggered when the employee is unable to perform the essential functions of the job, i.e., substantially limited in the major life activity of working. App., *infra*, 16a, fn 4. This narrow view of the duty to reasonably accommodate is contrary to the intent of the ADA, as well as other circuit court cases interpreting this duty.

In *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959 (7th Cir. 1996), the Seventh Circuit dealt with a plaintiff who suffered from chronic severe allergic rhinitis and sinusitis, which impaired her ability to breathe normally. This condition was aggravated by environmental tobacco smoke at her office. *Id.* at 960. Homeyer filed suit under the ADA claiming that after requesting an accommodation from her employer several times for her disability, she was terminated. The trial court dismissed her complaint holding that she was not a qualified individual with a disability because she was not substantially limited in the life activity of working. *Id.* at 961. The Seventh Circuit reversed the district court, holding that her chronic severe allergic rhinitis and sinusitis which was alleged to be a substantial limitation on the activity of breathing was sufficient for her case to proceed. *Id.* at 961-962. The Seventh Circuit's analysis is contrary to the analysis of the Fifth Circuit in this case:

> "It cannot be, however, that every plaintiff that merely links an existing disability to the workplace is limited to an 'ability to work' analysis, for then every 'disability' claim asserted in an action against an employer would collapse into an 'ability to work' analysis. For example, a person in a wheelchair who seeks an accommodation from his employer would have to prove that his employment opportunities were limited generally in order to establish a 'disability' under the Act; he would be unable to simply claim that his major life function of walking was substantially impaired." *Id.* at 962 fn 1.

Further, both the Seventh Circuit and the Ninth Circuit, deciding cases under the Rehabilitation Act, have held that a reasonable accommodation does not have to be tied to the employee's ability to perform the essential functions of the job.

In *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992), the Seventh Circuit addressed the duty of an employer to provide a reasonable accommodation to an employee who could perform the essential functions of her job and was not impaired in any manner in her ability to perform her job. Plaintiff, whose childhood polio had left her with the handicap of sterility, sued her employer for discriminating against her by refusing to grant her request for child care leave on terms comparable to those given to biological mothers when she adopted a child. The Seventh Circuit reversed the trial court's dismissal, rejecting their suggestion that plaintiff's claim was defective because the accommodation she requested "was not related to any specific condition of her work." *Id. at* 227. As the court noted:

"Child-care leave is related to work in the relevant sense. The Rehabilitation Act calls for reasonable accommodations that permit handicapped individuals to lead normal lives, not merely accommodations that facilitate the performance of specific employment tasks." *Id.* at 227.

In *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993), the Ninth Circuit addressed a similar situation. Buckingham requested a transfer from the post office in Columbus, Mississippi to one in Los Angeles in order to obtain better medical treatment for his disabling condition, AIDS. The Ninth Circuit rejected the employer's argument that Buckingham's transfer request was not a reasonable accommodation to his handicap because it was not tied to his ability to perform the essential functions of his job. In so doing, the Ninth Circuit held:

"Buckingham is not asking for a different job. Nor is he asking for a job that is not reasonably available under the postal service's existing policies (references omitted.) He is asking for the same job at a different location. It is not per se unreasonable under the Rehabilitation Act to transfer Buckingham to a location where he can obtain better medical treatment for his handicap.

"Furthermore, contrary to what the government urges, employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job. *Qualified handicapped employees who can perform all job functions may require reasonable*

accommodation to allow them to (a) enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees or (b) pursue therapy or treatment for their handicaps. In other words, an employer is obligated not to interfere, either through action or inaction, with a handicapped employee's efforts to pursue a normal life." *Id.* at 740 (emphasis added).

The Fifth Circuit's decision that an employer must only accommodate a substantially limiting impairment that interferes with the employee's ability to perform the essential functions of the job is a much narrower interpretation, leaving both employees and employers in the dark as to what their respective rights and responsibilities are under the ADA. The need for this Court to address and clarify this issue is paramount.

III. Is Leave a Reasonable Accommodation?

The ADA specifies that reasonable accommodation may include job restructuring and part- time or modified work schedules. 42 U.S.C § 12111(9)(B). Congressional intent for leave as a form of reasonable accommodation under the ADA is clear from the legislative history of both the House of Representatives and the Senate. The House Report provided that "[R]easonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer." H. REP. No. 485 at 63. The Senate Report makes only one reference to employee leave in terms of reasonable accommodation. It states that employers are not obligated to give disabled employees *more paid leave* than other employees. S. REP. No. 116 at 31.

The EEOC recognizes leave as a form of reasonable accommodation. "Accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment...". 29 C.F.R. 1630, App. § 1630.2(o).

Despite the language of the ADA, the clear intent of Congress, and the interpretative guidance provided by the EEOC, the Fifth Circuit held that Petitioner failed to request a cognizable, reasonable accommodation as he never requested Respondent to change any aspect of his job. App., *infra*, 25a- 26a.

The Fifth Circuit's opinion is in direct conflict with the opinion of the Federal Circuit in *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996). In a case decided under the ADA, the Federal Circuit held that providing an alcoholic leave to obtain in-patient treatment and allowing him to perform his job on a restricted-duty status while he continued his recovery, was a reasonable accommodation. In so holding, the court stated "[T]reatment would seem to be essential to any accommodation for alcoholism. *Id.* at 1107.

Cases decided under the Rehabilitation Act are in conflict as well. See *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990) (post office had reasonably accommodated an alcoholic employee by granting leave for treatment); *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989) (leave for treatment is a reasonable accommodation for an alcoholic employee).

The Fifth Circuit's reasoning that Petitioner did not request an accommodation, he only requested to return to

his position as he left it when he entered treatment, ignores the obvious. Leave for treatment necessarily implies being able to return after the treatment is complete. This is a form of reasonable accommodation contemplated by the ADA.

IV. The Decision is Erroneous

The Fifth Circuit's archaic view of the disease of alcoholism and its treatment of an alcoholic in this case is clearly erroneous. This opinion ignores the clear mandate of the ADA:

> "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201.

Nevertheless, this case does just that. The Fifth Circuit, in a major departure from established precedent, has opined a lesser standard of protection for individuals with the disability of alcoholism in the private sector than is set forth for the federal sector.

Alcoholism is a permanent condition which, when reaches the stage that Petitioner's had, substantially limits its victim's major life activities and ability to enjoy life. Alcoholics in the workforce, as a general rule, primarily need one thing-leave for treatment. Provided it does not present an undue burden to the employer, which was not asserted in this case, this is a reasonable request which has the end result of improving the employee to the

benefit of the employer. The Fifth Circuit's opinion ignores the clear language of the ADA, the intent of Congress and prior case law, presenting an intolerable setback to a class of persons intended to be protected under the Act.

V. The Questions Presented are Important.

The majority of the cases litigated under the ADA revolve around the interpretation of the definition of disability.[3] This case gives this Court the opportunity to address and resolve the dilemmas faced by employers and employees in deciding who is entitled to protection under the Act.

Further, six to ten percent of any employee population in the United States is estimated to suffer from the disease of alcoholism.[4] Many of the cases brought under the ADA have dealt with alcoholics or recovering substance abusers. The intent of Congress not to exclude this class of persons from the ADA is clear. However, the Fifth Circuit's opinion does just that by requiring a permanent secondary impairment. This Court should resolve the uncertainty created by this case.

Finally, the Fifth Circuit's opinion restricts the right of individuals with disabilities to seek and obtain a reasonable accommodation from their employer. The

---

[3] Wendy Wilkinson, Judicially Crafted Barriers To Bringing Suit Under the Americans With Disabilities Act, 38 S. Tex. L. Rev. 907 (1997).

[4] Wendy K. Voss, Note, Employing the Alcoholic Under the Americans With Disabilities Act of 1990, 33 Wm. & Mary L. Rev. 895, 902 (1992).

need for clarification from this Court is crucial.

In sum, this case now puts the courts in significant disagreement on matters of importance to the courts and to the American workforce. This case presents a rare opportunity for this Court to address the most disputed and litigated sections of the ADA and to bring much needed certainty and uniformity to this area. Accordingly, the Court should grant the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DOWNS, JUDIN & STANFORD, P.C.

JENNIFER JUDIN
STATE BAR I.D. NO. 11047100
501 Elm Place, Suite 200
Dallas, Texas 75202
Phone: (214) 748-7900
Fax: (214) 748-4530

Counsel For Petitioner

REVISED, August 4, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-10990

ROBERT P. BURCH,

Plaintiff-Appellee,
Cross-Appellant,

versus

COCA-COLA, CO.,

Defendant-Appellant,
Cross-Appellee,

Appeals from the United States District Court for the Northern District of Texas

---

July 30, 1997

Before GARWOOD, WIENER and DEMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellee, cross-appellant Robert P. Burch (Burch) brought this suit under the Americans with Disabilities Act (ADA) asserting that his termination by his employer defendant-appellant, cross-appellee Coca-Cola Co. was in violation of the ADA. Burch also advanced Texas law claims of intentional infliction of emotional distress and defamation. The trial court granted Coca-Cola's motion for summary judgment on the state law claims and granted judgment as a matter of law for Coca-Cola on the ADA intentional discrimination claim. The jury returned a verdict in favor of Burch on the ADA reasonable accommodation claim. Coca-Cola appeals the denial of its motion for judgment as a matter of law on the reasonable accommodation claim. Burch cross appeals the judgment as a matter of law on his intentional discrimination claim and the summary judgment on his defamation claim. We hold that Coca-Cola was entitled to judgment as a matter of law on both the intentional discrimination and the reasonable accommodation ADA claims, and that summary judgment was properly awarded to it on the defamation claim.

Facts and Proceedings Below

Burch, a former management-level employee of Coca-Cola, brought this suit against his former employer under the ADA. Burch, a recovering alcoholic, alleged that Coca-Cola terminated him because of his alcoholism and, alternatively, failed to accommodate his disability by terminating him instead of permitting him to return to work after he successfully completed a rehabilitation program.

Coca-Cola recruited Burch in mid-1989. At that time, Burch was a twenty-four-year veteran of the General Electric Company having achieved some success in various management positions. Burch commenced his employment with Coca-Cola in July 1989 as an area service manager for the company's Fountain Division. Coca-Cola assigns service responsibility by geographic area, dividing the country into several regions. As the area service manager for the southwest region, Burch was responsible for managing Coca-Cola's service network for a region that included all of Texas and stretched from North Dakota to Colorado and from Mississippi to parts of Arizona. He directly supervised approximately twenty Coca-Cola employees.

Burch's tenure with Coca-Cola was largely without incident and he was evaluated consistently as a manager who met requirements in a satisfactory manner. In 1991, Coca-Cola recognized Burch as the Area Service Manager of the Year. In July 1993, Burch received his highest overall evaluation score--an "M.E."----which signified that Burch "met or exceeded" goals. Burch's evaluations, however, reflect that "working relationships" was a "developmental area" for him. Burch was never formally reprimanded for improper behavior prior to his termination in November 1993.

In May 1992, Burch sought, and began receiving, counseling pursuant to Coca-Cola's Employee Assistance Program (EAP). Counseling pursuant to Coca-Cola's EAP is confidential; counselors are not permitted to notify Coca-Cola of the matters discussed or the name of the particular employee seeking counseling. Clinical social worker Cynthia Maddox, an EAP-provided counselor, saw Burch from May 29, 1992, until August 31, 1992, and

again on February 3, 1993. Burch and Maddox primarily discussed relationship problems Burch was having with his then-current girlfriend. Burch, who has been married four times, was troubled with his inability to have lasting personal relationships. Although Maddox did not treat Burch for alcohol abuse, she noted a possible alcohol problem.

On February 3, 1993, Burch requested a psychiatric referral from Maddox. Maddox referred Burch to Dr. Joel Holiner, a psychiatrist in private practice, after concluding that Burch was exhibiting "obsessive, compulsive, and paranoid" behavior.

Burch saw Dr. Holiner in February 1993. Dr. Holiner diagnosed Burch as suffering from "adjustment disorder with depressed mood" and "probable alcohol abuse." Dr. Holiner in turn referred Burch to Dr. Marcelo Matamoros, a psychotherapist in private practice, for additional therapy. Dr. Matamoros began treating Burch several days after his referral, also in February 1993.

Burch testified that throughout this time he was drinking heavily during his off hours, routinely drinking eight or ten beers in the evening. Burch also testified that, although he never drank during working hours, he experienced hangover-like symptoms in the mornings and attempted to isolate himself from interaction with people. Burch would close his office door and complete paperwork in the morning to avoid contact with other Coca-Cola employees, explaining that he "wasn't a morning person."

Although Burch had been a regular drinker since age fourteen, he testified at trial that he believed his tenure at

Coca-Cola exacerbated his problems with alcohol. Burch testified that alcohol was served regularly at Coca-Cola functions and that he drank regularly with both his peers and supervisors during business trips. The Coca-Cola "culture," as characterized by Burch, amounted to a fraternity of drinkers and contributed to his alcoholism. Burch testified that at his first Coca-Cola meeting in 1989, his supervisor, Bill Speer, called for an afternoon "beer break" instead of a coffee break. Similarly, Burch claimed that company-sponsored cocktail hours were common and that managers typically frequented bars and cocktail lounges after area service managers meetings.

Bill Speer was replaced as Burch's supervisor by Jose Smith, a man who Burch claimed had an exceedingly aggressive management style. Burch experienced no problems with his professional working relationship with Smith and no testimony was presented concerning any contact between Burch and Smith outside of their respective professional responsibilities. Smith's evaluations of Burch were unremarkable; Burch was rated as a competent area service manager with no noted problems of any significance.

Burch's third supervisor, Perry Cutshall, replaced Smith after approximately two years in 1991. Burch testified that he "tried real hard to build a relationship" with Cutshall, regularly drinking with him in Atlanta after monthly area service managers meetings. Burch further testified that Cutshall had been intoxicated on at least one occasion and that drinking after the meetings was "part of the protocol." Burch contended at trial that he informed Cutshall in 1992 that he had sought EAP counseling, but did not specify that he was concerned about an alcohol problem.

Burch also testified that he drank extensively with his fellow area service managers George Hawkins and Jerry Allen, although he contended that he curtailed his social drinking after he entered counseling with Maddox in 1992. Burch testified that he believed that Hawkins and Allen----whom he considered to be close social friends of Cutshall----ostracized him in 1992 when he stopped drinking with them after meetings and on business trips. Burch admitted, however, that Cutshall recommended him for two positions that would have been considered promotions after the perceived ostracism began in May 1992.

The only testimony concerning inappropriate conduct on the job by Burch prior to September 1993 was an incident involving a Coca-Cola customer service representative, Lajuanna Ajayi, in March 1993. The incident involved a McDonald's restaurant that had been without fountain service for an extended period. After unsuccessful attempts to reach an intermediate service manager, Ajayi contacted Burch directly by pager. Although the precise facts were contested at trial, it was established that Burch, who was in Toronto, was short with Ajayi when he answered the page. Ajayi complained to her supervisors, who in turn reported the incident to Cutshall. Cutshall spoke with Burch about the incident in Atlanta shortly after it occurred. Burch apologized to Ajayi but no formal reprimand was made by Cutshall.

The events leading up to Burch's termination began at a September 22, 1993, area service mangers meeting in Atlanta. The meeting, at which approximately thirty-five Coca-Cola managers from around the country were in attendance, was held in a warehouse in Dunwoody, Georgia, a suburb north of Atlanta. The meeting lasted all

day, with presentations from Coca-Cola managers concerning various procedures and developments affecting the fountain division. Burch testified that, during the meeting, Allen and Hawkins made repeated derogatory comments about him. Burch's version of the events of the meeting were largely corroborated by the participants. There was testimony to the effect that joking and bantering between the managers was routine, although Burch testified that the disruptions at the meeting were exceptional. At the time of the September 1993 meeting, Allen was assigned to a position at the customer communications center that was roughly equivalent to Burch's status as an area service manager. Hawkins was Allen's superior.

After the meeting concluded that afternoon, the participants went to the Dunwoody Holiday Inn for a reception honoring Max Trowbridge, who was the outgoing area service manager for New York and was transferring to Coca-Cola's Integrated Operating Systems (IOS) division. According to Burch, Trowbridge's transfer was not an advancement, but rather a result of his poor performance as an area service manager. The evening event commenced at six o'clock and began with a cocktail hour in a reception room at the hotel. Burch testified that he had had several drinks, but did not become intoxicated. Dinner was also served in the reception room.

Burch testified that Trowbridge, while addressing the group, said that Burch was "a good candidate for" IOS. Burch took offense at this comment, which he considered to be an attack on his competence.[1] Burch further

---

[1] Brady Lum, a manager affiliated with IOS, testified that he interpreted the remarks as a compliment.

testified that Hawkins rejoined with "Perry would enjoy that," referring to Burch's supervisor Cutshall. The room laughed at the remarks and Burch turned to face the table at which Allen, Hawkins, and Cynthia Bilbo[2] were sitting. Because Hawkins's back was toward Burch, Burch pointed at Allen and mouthed "fuck you" twice and "get off my ass." Burch, as he admitted, at the same time also motioned with his head for Allen to meet him outside the room. Burch testified that, throughout the exchange, Allen kept laughing. Burch----who is some 6'5" tall, weighed about 223 pounds, and biked some 100 to 200 miles a week----admitted that he had then been "red in the face" and "very angry," but stated that he never left his chair and never intended to engage in any physically violent behavior. After the episode, a manager seated at Burch's table, Mike Memoli, told Burch to calm down. Burch remained seated at his table for the remainder of the dinner without incident.

Burch testified that Hawkins apologized to him after dinner for the remarks he had made throughout the day at the meeting and at the dinner. Cutshall was not aware that the episode had occurred until after the dinner was over.[3] Cutshall and Burch did not speak about the

---

[2] There was testimony to the effect that Bilbo was among the group during the afternoon meeting that had made antagonistic comments toward Burch. In September 1993, she was assigned to the customer communications center and reported directly to Allen. The jury heard testimony that both at the time of the incident and during the trial Bilbo had a romantic relationship with Cutshall.

[3] Bilbo testified that she informed Cutshall as the

incident at the following day's meeting. Burch returned to Dallas the evening of September 23, 1993.

Upon his return to Dallas, Burch attempted to contact Dr. Matamoros, who was out of town. Burch spoke with the counselor on duty who recommended consultation with a psychiatrist because of the severity of Burch's depression and described alcohol abuse.

The following afternoon, September 24, 1993, Burch learned from John Barker, an area service manager from St. Louis who had also attended the dinner in Atlanta, that the Coca-Cola human resources department was investigating Burch's conduct at the dinner. Burch testified that he attempted unsuccessfully to contact Cutshall on Friday to discuss the incident.

On Saturday, September 25, 1993, Burch spoke with Cutshall, who informed him of the pending human resources investigation. Cutshall directed Burch to discuss his version of the incident with Frank Tola, who was to lead the investigation. Burch told Cutshall for the first time that he was experiencing problems with alcohol abuse and that he intended to undergo treatment at Charter Hospital in Dallas. Burch testified that he spoke with several managers on Saturday who had attended the

---

dinner was breaking up. Cutshall testified that he spoke with Allen and Hawkins to get their versions later that evening. Cutshall spoke with Lum about the incident the next day, September 23, 1993. The evening of September 22, 1993, Cutshall also learned of an earlier incident between Burch and another Coca-Cola manager, James Britton.

Atlanta meeting and dinner concerning the incident and its severity.

On Sunday, September 26, 1993, Burch was admitted voluntarily to Charter Hospital. Dr. Edgar Nace was Burch's treating physician, who admitted Burch on an in-patient basis. Burch remained at Charter Hospital until October 6, 1993, at which point he became a day patient. Burch then contacted Cutshall and requested to return to work on a part-time basis. Cutshall informed Burch that he could not return as he was on suspension pending completion of the human resources investigation. Burch remained on full salary throughout his treatment (which was paid for by Coca-Cola's benefit plan) and until his termination.

On October 27, 1993, Burch sent a letter to Tola requesting to "return to work immediately." Letters from Dr. Nace and Dr. Matamoros were also then forwarded to Tola attesting to Burch's readiness to return to work at Coca-Cola. In a memorandum dated October 27, 1993, Tola recommended that Burch be discharged for his behavior at the dinner. Tola's recommendation was supported by six Coca-Cola managers.

Tola asked Burch to return to his office in Dallas on November 4, 1993. Upon his arrival he was met by Tola and Cutshall, who informed Burch that he was terminated from his employment with Coca-Cola for "performance issues." Burch was asked to return all company property and was escorted off the premises by an off-duty police officer.

The following Monday, Burch went to the offices of Drake, Beam & Morin, a placement firm used by

Coca-Cola. During his visit, Burch testified that he was met by an employee who wanted reassurances that Burch would not behave improperly while in the Drake, Beam & Morin offices. Burch further testified that the questions were a result of a facsimile received from Coca-Cola stating that Burch had been terminated for "violent and threatening behavior." Burch left the offices.

Since his termination from Coca-Cola, Burch has held two subsequent managerial jobs. The first, a $115,000 a year management position with Bell Packaging in Michigan, lasted from April to September 1994, when he was terminated for a conflicting management style. The second, a $60,000 a year management position with Montgomery Ward in Dallas, ended after several months when Burch resigned in lieu of termination.

Burch filed suit in state court in Dallas County, Texas, alleging that he had been terminated in violation of the ADA and asserting state law claims of defamation and intentional infliction of emotional distress. Coca-Cola removed the action to the United States District Court for the Northern District of Texas (Dallas Division). Pursuant to 28 U.S.C. § 636(c), the parties consented to trial before a magistrate judge.

Coca-Cola filed a motion for summary judgment on all claims. After Burch's response was filed, the magistrate judge issued a memorandum order granting summary judgment in favor of Coca-Cola on the Texas law defamation and intentional infliction of emotional distress claims and denying summary judgment on Burch's ADA claims.

The case was tried before a jury in Dallas. At the close of Burch's evidence, Coca-Cola made a motion for judgment as a matter of law pursuant to Rule 50. The magistrate judge granted the motion on the ADA intentional discrimination claim but denied the motion on the ADA reasonable accommodation claim. Coca-Cola's renewed motion (on the reasonable accommodation claim) at the close of all the evidence was denied.

The jury returned a verdict in favor of Burch, finding that Coca-Cola terminated Burch in violation of the ADA. The jury awarded Burch $109,000 in backpay, $700,000 in front pay, $300,000 in compensatory damages, and $6,000,000 in punitive damages. Coca-Cola moved for judgment as a mater of law or, in the alternative, for a new trial.

The magistrate judge denied Coca-Cola's motion and entered judgment for Burch. The magistrate judge reduced the front pay award to $294,777 (representing the discounted value of five years front pay), reduced the punitive damage award to zero, and awarded Burch attorneys' fees of $208,072. Coca-Cola renewed its motion for judgment as a matter of law or a new trial. The magistrate judge denied Coca-Cola's motion.

Coca-Cola has appealed. It asserts that the magistrate judge erred by denying its motion for judgment as a matter of law on the ADA reasonable accommodation claim, by denying its motion for a new trial, and by awarding an excessive amount of compensatory damages. Burch has cross appealed. He asserts that the magistrate judge erred by granting Coca-Cola summary judgment on his Texas law defamation claim and by granting

Coca-Cola's motion for judgment as a matter of law on his ADA intentional discrimination claim.

Discussion

Both parties appeal from the magistrate judge's rulings on Coca-Cola's Rule 50 motions for judgment as a matter of law. This Court reviews de novo rulings on Rule 50(a) and (b) motions, using the same standards as those to be employed by the trial court. RTC v. Cramer, 6 F.3d 1102, 1109 (5th Cir. 1993).

After a party has been fully heard on an issue, a trial court may grant an opposing party's motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). In such circumstances, we view the entire trial record in the light most favorable to the non-movant, drawing reasonable factual inferences in its favor. Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994). "'The 'decision to grant a directed verdict . . . is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury.'" Id. at 1300-01 (quoting In re Letterman Bros. Energy Sec. Litig., 799 F.2d 967, 972 (5th Cir. 1986), cert. denied, 107 S.Ct. 1373 (1987)). "If the facts and inferences point so strongly and overwhelmingly in favor of the moving party . . . that reasonable jurors could not have arrived at a contrary verdict, then we will conclude that the motion should have been granted." Cramer, 6 F.3d at 1109 (5th Cir. 1992) (citing Boeing v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

I. Reasonable Accommodation

"'The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.'" Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 161 (5th Cir.) (quoting 29 C.F.R. § 1630, App. (1995)), cert. denied, 117 S.Ct. 586 (1996). In order to achieve this goal, the ADA prohibits----as a form of discrimination----an employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [an employer] can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A) (1995).

The ADA, its implementing regulations, and the EEOC's interpretive guidance make clear that an employer's obligation to provide a "reasonable accommodation," when triggered, contemplates changes to an employer's procedures, facilities, or performance requirements that will permit a qualified individual with a disability to perform the essential functions of his or her job. In all cases a reasonable accommodation will involve a change in the status quo, for it is the status quo that presents the very obstacle that the ADA's reasonable accommodation provision attempts to address. The ADA provides:

"The term 'reasonable accommodation' may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111.

In addition to repeating the examples of reasonable accommodations set forth in the statute, the regulations define the term as "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii) (1996). The EEOC's interpretive guidance also emphasizes the protean nature of the employer's obligation. See 29 C.F.R. § 1630, App. (1996) ("In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.").

We conclude that this case was improperly tried on a reasonable accommodation theory. First, Burch failed to establish that his alcoholism interfered in any way with his ability to perform the essential functions of an area service manager for Coca-Cola without reasonable accommodation or, for that matter, that his alcoholism ever substantially impaired any major life activity. Second, Burch failed to establish that he ever requested any modification or adjustment to his job as an area service manager with Coca-Cola. A wrongful termination claim under the ADA is not properly analyzed under a reasonable accommodation theory unless an employer is

shown to have terminated a qualified individual with a disability in order to avoid accommodating that employee's impairments at the workplace. Accordingly, an employee who requests only the opportunity to return to an unmodified, previously-held position fails to state a cognizable claim under 42 U.S.C. § 12112(b)(5).

A. Burch's Limitation

"[T]he ADA requires employers to reasonably accommodate limitations, not disabilities." Taylor, 93 F.3d at 164. This is a critical distinction, because the existence vel non of a disability or impairment is material to a reasonable accommodation claim only insofar as it limits an employee's ability to perform his or her job. Id.[4] ("Thus, while a given disability may limit one employee (and therefore necessitate a reasonable accommodation), it may not limit another."); see also Beck v. University of Wisc. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) ("It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in

[4] Burch argues that "to be protected under the ADA, an individual need only show that a major life activity is substantially limited; there is no requirement that the individual also show that he is limited in the activity of working as well." This is true insofar as Burch may assert a claim for intentional discrimination under the ADA. To assert a discrimination claim under the reasonable accommodation provision, however, Burch must demonstrate that a substantially limiting impairment somehow affected his ability to perform his job. Without such a showing, there would be nothing for an employer to accommodate.

order to enable a disabled individual to work.") (quotation omitted). Accordingly, an impairment must be substantially limiting at the time of the requested accommodation. See Pritchard v. The Southern Co. Servs., 92 F.3d 1130, 1133 (11th Cir. 1996); Muller v. Automobile Club of S. Ca., 897 F.Supp. 1289, 1295-96 (S.D. Ca. 1995).

The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111. The ADA further defines an actionable disability, in relevant part, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Id. § 12102(2)(A). "Physical or mental impairment,"[5] "substantially limits,"[6] and "major life activities"[7] are all defined in the applicable regulations.

---

5 "(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. §1630.2(h) (1996).

6 "(j) Substantially limits--(1) The term

Coca-Cola contends that Burch failed to establish that he was a qualified individual with a disability as required by the ADA. In response, Burch makes a number of arguments in support of his assertion that his alcoholism made him a "qualified individual with a disability." The first, briefly stated, is that Dr. Nace, Burch's expert, said it did. The relevant testimony of Dr. Nace is as follows:

"Q. I want to read to you the definition of disability under the Americans with Disabilities Act. It says, 'The term disability means with respect to an individual a physical or mental impairment that substantially limits one or more of the major life activities of such individual.' Using that definition is an alcoholic disabled?

A. Yes.

---

substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Id. § 1630.2(j).

[7] "(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. § 1630.2(i).

Q. In your opinion does Bob fit the definition of disabled under he [sic] Americans with Disabilities Act?

A. Yes, I think so."

Dr. Nace's testimony, even as Burch's treating physician, sheds no light on the individualized inquiry required by the ADA. Dr. Nace testified only in general terms about alcoholics as a class. The only testimony given by Dr. Nace concerning Burch individually concerned Burch's ability to function without limitation.[8] As the EEOC's interpretive guidance makes plain, the ADA does not attempt to set forth a laundry list of impairments that are disabilities. See 29 C.F.R. § 1630, App. (1996) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others . . . ."). Unlike HIV infection, the EEOC has not attempted to classify alcoholism as a per se disability, and we decline to adopt such a questionable position. See id.; Foreman v. The Babcock & Wilcox Co., No. 96-60510 (5th Cir. July 10, 1997)(employee's heart condition with surgically implanted pacemaker did not substantially limit the major life activity of working); Robinson v. Global Marine Drilling Co., 101 F.3d 35, 37

[8] Dr. Nace agreed that by mid-October 1993 Burch would have been "a better employee than he was before," and "a more productive and improved employee." On cross-examination, Dr. Nace acknowledged that Burch's status as a recovering alcoholic did not affect his ability to walk, sit, hear, work, or participate in any "usual activities."

(5th Cir. 1996) (asbestosis sufferer who experienced episodic shortness of breath due to a reduced lung capacity was not substantially limited in the major life activity of breathing); Oswalt v. Sara Lee Corp., 74 F.3d 91, 92 (5th Cir. 1996) ("'[h]igh blood pressure, alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protection of the ADA'"); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 & n.11 (5th Cir. 1995) (evidence of a partially crippled arm insufficient to meet the standard of substantially limiting a major life activity); see also McKay v. Toyota Motor Mfrg., USA, Inc., 110 F.3d 369, 372 (6th Cir. 1997)(diagnosed "carpal tunnel syndrome" did not substantially limit the major life activity of working); Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997) (employee's dysthymia, a chronic depressive disorder, did not substantially limit the assumed major life activity of "get[ting] along with others").

Second, Burch makes reference to his testimony that his ability to walk, talk, think, and sleep were affected when he drank too much. Burch also testified that he had hangovers in the morning that affected his memory. That Burch's inebriation was temporarily incapacitating is not determinative. Burch produced no evidence that the effects of his alcoholism-induced inebriation were qualitatively different than those achieved by an overindulging social drinker: in both situations, the natural result of overindulgence is the temporary impairment of senses, dulled reactions, and the prospect of a restless sleep followed by an unpleasant morning. Although Burch's alcoholism assuredly affected how he lived and worked, "far more is required to trigger coverage under § 12102(2)(A)." Ellison v. Software

Spectrum, 85 F.3d 187, 191 (5th Cir. 1996). Burch's testimony that his inebriation was frequent does not make it a permanent impairment. Permanency, not frequency, is the touchstone of a substantially limiting impairment. Although Burch's alcoholism may have been permanent, he offered no evidence that he suffered from any substantially limiting impairment of any significant duration.[9] We have previously rejected attempts to transform temporary afflictions into qualifying disabilities. See Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996); Rakestraw v. Carpenter Co., 898 F. Supp. 386, 390 (N.D. Miss. 1995); see also Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 16 (1st Cir. 1997); Sanders v. Arneson Products, Inc., 91 F.3d 1351, 1354 (9th Cir. 1996), cert. denied, 117 S.Ct. 1247 (1997); 29 C.F.R. § 1630.2(j), App. (1996) ("[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.").

---

[9] This is not to say that an alcoholic can never demonstrate a substantially limiting impairment. But where, as here, an alcoholic's only proffered impairments are the primary result of temporary inebriation, such proof is insufficient. Burch offered no testimony that his alcoholism-induced inebriation permanently altered his gait, his ability to speak properly, his memory when sober, or produced long-term insomnia. In fact, when Burch began treatment for his alcoholism in late September 1993, he reported to Charter Hospital that he had been bicycling recreationally between 100 and 200 miles a week. Burch concedes that, prior to his paid leave to undergo treatment, his work was unaffected by his alcoholism. Burch testified that he never drank during working hours

Third, Burch argues that "[t]he fact that Burch ultimately had to be hospitalized establishes that his alcoholism substantially limited his major life activities." For this proposition, Burch relies upon School Bd. of Nassau County v. Arline, 107 S.Ct. 1123, 1127 (1987), a Rehabilitation Act case involving a claimant suffering with an acute form of tuberculosis so severe that it required hospitalization. In Arline, the Supreme Court, describing the effect the plaintiff's tuberculosis had on her respiratory system, observed, "[t]his impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment." Id. (noting that her hospitalization established a record of impairment under the Rehabilitation Act).

The quoted language from Arline cannot be construed to obviate the requirement, explicit in the ADA and its implementing regulations, that purported conditions be examined to ascertain whether a specific condition substantially limited a major life activity. The ADA requires an individualized inquiry beyond the mere existence of a hospital stay. Although the Court in Arline noted that the plaintiff's hospitalization established a record of impairment, the defendant had conceded that her acute tuberculosis had been substantially limiting. Indeed, the defendant's position in Arline was not that the plaintiff was not "handicapped," but rather that her contagious disease----tuberculosis----was a threat to the health of others (and therefore precluded liability for termination on that basis). To accept Burch's reading would work a presumption that any condition requiring temporary hospitalization is disabling----a presumption that runs counter to the very goal of the ADA. See Ellison,

85 F.3d at 190-91 (plaintiff who worked a modified schedule during radiation treatment for breast cancer had failed to establish a substantially limiting impairment under the ADA); Demming v. Housing and Redev. Auth., 66 F.3d 950, 955 (8th Cir. 1995) (rejecting plaintiff's position that, under Arline, proof of hospitalization for thyroid cancer established a disability under the Rehabilitation Act); Sanders, 91 F.3d at 1354 (psychological impairment requiring treatment and precluding work for three and a half months "not of sufficient duration to fall within the protections of the ADA as a disability"); Taylor v. United States Postal Service, 946 F.2d 1214, 1217 (6th Cir. 1991) (Arline should not be read "as establishing the nonsensical proposition that any hospital stay is sufficient to evidence a 'record of impairment'" under the Rehabilitation Act); Coghlin v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (Arline's analysis did not address the "substantially-limits" portion of disability under the ADA).

Fourth, Burch contends that his impairment must be viewed without regard to "mitigating measures." The EEOC's interpretive guidance does state that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630.2(h), App. (1996). Even assuming, however, that Burch's treatment for alcoholism was the equivalent to a diabetic's insulin dose----a proposition neither supported by the record nor judicially noticeable----we note that Burch failed to establish that his untreated alcoholism substantially limited any major life activity or that he required any continuing treatment whatsoever after he completed the rehabilitation program at Charter. Cf.

Harris v. H&W Contracting Co., 102 F.3d 516, 522-23 (11th Cir. 1996) (finding material issue of fact existed as to whether employee with Grave's disease was substantially limited where there was evidence that prior overdosage of thyroid medication produced "panic attack" and that withdrawal of medication would cause coma and death).

Burch admonishes the Court that if his successful completion of rehabilitation precludes him from recovery under the ADA we will produce "the anomalous result of affording protection for alcoholics who continue to drink, but not for those who are recovering." Not so. It is not difficult to imagine the myriad types of health problems, both physical and mental, that continue to plague even recovering alcoholics. Under different circumstances----and additional evidentiary support----an alcoholic may establish the need for reasonable accommodation of an alcoholism-induced impairment. Burch simply has not done so; there is insufficient evidence in the record to support a jury finding that Burch ever suffered a substantial impairment of a major life activity, much less that he did so on or after October 27, 1993. Although Burch's alcoholism would not necessarily preclude him from asserting reasonable accommodation rights under the ADA, it plainly does not excuse his failure to meet the statutory prerequisites.[10]

---

[10] Burch discerns in the ADA's legislative history a congressional intent to assist recovering alcoholics. Burch draws this conclusion principally from Congress's decision not to exempt alcoholics in 42 U.S.C. § 12114 as it had current users of illegal drugs. The decision not to exclude alcoholics peremptorily, however, is far from a decision to confer disabled status without the inquiry prescribed by the ADA. Congress has been especially

B. Requested Accommodation

In addition to Burch's failure to establish that he was a qualified individual with a disability, his failure to request a cognizable, reasonable accommodation also demonstrates the magistrate judge's error in submitting this case to the jury on a reasonable accommodation theory.

As set forth above, the ADA contemplates modifications or adjustments to an employer's procedures, facilities, or, perhaps, performance requirements to enable a disabled employee to accomplish his or her job. Burch never requested Coca-Cola to change any aspect of his job. To the contrary, Burch has contended consistently that he required no job concessions----that he was in every way fit to return to precisely the same position, the same responsibilities, the same schedule, the same supervisor, and even the same office that he had prior to his treatment at Charter.

---

reluctant to confer privileges on the basis of alcoholic status alone. See, e.g., Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105, 110 Stat. 847, 852-55 ("An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.") (denying Social Security disability benefits to alcoholics). Wherever Congress's sympathies lie, we find no evidence in the legislative history or elsewhere of a congressionally conferred exemption for alcoholics from the rigors of the scheme set forth in the ADA.

Burch contends that Coca-Cola refused to provide him a reasonable accommodation on two separate occasions. First, he argues, Coca-Cola "refused Burch's request that he return to work part-time while he was still in treatment." We may dispose of this first contention of Burch's with dispatch. Although the jury was instructed as to an employer's reasonable accommodation obligations under the ADA, it was asked only: "Was Plaintiff Robert Burch terminated by Defendant The Coca-Cola Company in violation of the ADA?" The reasonableness of Coca-Cola's accommodation to Burch on October 6, 1993,----to retain him on full salary while he completed his treatment at Charter rather than take him back on a part-time basis----was not an issue that was before the jury.[11] There is no record evidence that

[11] Even had Burch tried this case on the theory that Coca-Cola's refusal to permit him to return to work on a part-time basis on October 6, 1993, was a failure to provide a reasonable accommodation, which he did not, we have substantial doubt that Coca-Cola's decision to retain him on suspension with full pay was not a reasonable accommodation. Other courts have found that unpaid leave granted to an employee undergoing treatment can be a reasonable accommodation, see Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) ("Requiring paid leave in excess of an employee's scheduled amount would unjustifiably upset the employer's settled budgetary expectations, and thus cannot be considered a reasonable accommodation."), and that in some circumstances an employer may have no obligation to provide even unpaid leave, see Hudson v. MCI Communications, 87 F.3d 1167, 1169 (10th Cir. 1996) (holding that unpaid leave of indefinite duration is not a reasonable accommodation). Certainly, Coca-Cola was not forced to create a part-time position if the essential functions of the area service

Coca-Cola terminated Burch because he could not return to work earlier than October 27, 1993, when he requested to return to work on a full-time basis. And, no evidence was introduced to support any damage award on a claim of failure to allow return to part-time work while still in treatment.

This Court will not consider on appeal a claim not submitted to the district court. "A party has presented an issue in the trial court if that party has raised it in either the pleadings or the pretrial order, or if the parties have tried the issue by consent." Portis v. First Nat'l Bank of New Albany, 34 F.3d 325, 331 (5th Cir. 1994). Burch's First Amended Complaint, upon which his case was tried, complains only of his ADA wrongful termination claim (in addition to his Texas law defamation and intentional

---

manager's position demanded a full-time manager. Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (citing Chiari v. City of League City, 920 F.2d 311, 318 (5th Cir. 1991)), cert. denied, 116 S.Ct. 1263 (1996).

Burch's citation of Rizzo v. Children's Learning Ctrs., Inc., 84 F.3d 758, 765 (5th Cir. 1996), does not support his position. Rizzo, a summary judgment case in which this Court held that an employer's decision to lower a concededly disabled employee's hours, to require her to work a "split shift," and to change her position from bus driver to cook produced a fact issue as to whether there had been an adverse employment action, left unresolved whether the changes were an adverse employment action or were merely efforts to accommodate the employee's disability.

infliction of emotion distress claims). The record before us contains no pretrial order. The jury was not charged concerning Coca-Cola's pretermination refusal to permit Burch to return to work on a part-time basis, and there was no request for such a change nor objection to its omission. There is nothing in the trial record to suggest----nor does Burch contend----that this separate claim was tried by consent as contemplated by Rule 15(b). See Moody v. FMC Corp., 995 F.2d 63, 65-66 (5th Cir. 1993). In sum, Burch abandoned any such claim by not properly raising it in the district court.

Burch's second argument is that Coca-Cola "refused his request that he be allowed to come back to work full-time." As stated, this claim was not properly analyzed as a failure to accommodate. Burch did not request an accommodation, he requested to return to his position as he left it when he entered treatment on September 26, 1993. He sought no changes to his position and desired nothing more than the ability to resume his career where he had left it. It is undisputed that throughout his absence he had remained on full salary as a Coca-Cola employee.[12] Coca-Cola's employee benefit plan paid for his treatment. Burch argues that the jury was free to reject Coca-Cola's explanation that Burch was terminated for his improper behavior at the managers meeting, but whether Coca-Cola would have fired a nonalcoholic for the same behavior is relevant only to an intentional discrimination

[12] Burch does not complain that Coca-Cola ever denied a prospective request for a leave of absence. We therefore have no need to address whether an employer would be required, in certain circumstances, to offer a leave of absence to an employee whose alcoholism qualified as a disability under the ADA.

claim. Here, Burch requested only Coca-Cola's grace----a request that Coca-Cola refrain from an employment action that, absent conflict with the ADA's intentional discrimination provision, Coca-Cola was left free to undertake.[13] The determination of whether Coca-Cola was required to refrain from terminating Burch because its true reasons for dismissal were discriminatory is at the heart of the subjective inquiry required to establish intentional discrimination under the ADA. Burch cannot characterize his intentional discrimination claim as a "request for accommodation" in order to take advantage of the objective inquiry under section 12112(5). A qualified individual with a disability who asks only to return to work----but who is instead fired by his employer----is entitled (on a proper evidentiary showing) to have the jury consider whether the employer acted with discriminatory intent, not whether permitting the employee to return to his old (unmodified) job would have been reasonable. As Burch had advanced no cognizable request for accommodation at the time of his termination, Coca-Cola's decision to terminate him was not actionable under section 12112(b)(5).[14] We therefore

---

[13] Burch was an at-will employee. Apart from the ADA's proscription of discrimination, Coca-Cola was free under Texas law to terminate Burch "for a good reason, a bad reason, or no reason at all." Figueroa v. West, 902 S.W.2d 701, 704 (Tex. App.--El Paso 1995, no writ); see also Schroeder v. Texas Iron Works, Inc., 813 S.W.2d 483, 489 (Tex. 1991); Jones v. Legal Copy, Inc., 846 S.W.2d 922, 925 (Tex. App.--Houston 1993, no writ).

[14] Coca-Cola cites a number of cases for the proposition that employers are under no obligation to accommodate misconduct that is the product of an employee's alcoholism. These cases are a correct

interpretation of section 12114(c)(4), which permits employers to hold alcoholic employees to the same standard of conduct as nonalcoholic employees. Section 12114(c)(4), unlike the pre-1992 Rehabilitation Act, does not require employers to excuse violations of uniformly-applied standards of conduct by offering an alcoholic employee a "firm choice" between treatment and discipline. Compare Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (discussing firm-choice rule); Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir. 1989) (same), with Johnson v. Babbitt, EEOC No. 03940100, 1996 WL 159072 (EEOC Mar. 28, 1996) (finding 1992 amendment to Rehabilitation Act, 29 U.S.C. § 791(g), which incorporated section 12114(c)(4), eliminated the requirement that an employer provide a "firm choice" as an accommodation). But cf. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practice, 95 F.3d 1102 (Fed. Cir. 1996) (finding that amended Rehabilitation Act obliged employer to provide leave for treatment to a disabled alcoholic as a reasonable accommodation, but did not require a "retroactive accommodation" by excusing misconduct).

In the cases cited by Coca-Cola, the employer's reason for termination was either uncontested or unrefuted by the employee. See, e.g., Siefkin v. Village of Arlington Hgts., 65 F.3d 664 (7th Cir. 1995) (granting summary judgment in ADA case in which the plaintiff-employee conceded termination for failing to monitor and control his diabetes, causing an auto accident); Maddox v. University of Tenn., 62 F.3d 843, 848 (6th Cir. 1995) (granting employer's summary judgment motion where alcoholic football coach failed to rebut employer's evidence that it terminated him for misconduct); Little v. FBI, 1 F.3d 255, 259 (4th Cir. 1993)

hold that the magistrate judge should have granted Coca-Cola's motion for judgment as a matter of law on Burch's reasonable accommodation claim.[15]

(affirming dimsissal of alcoholic FBI agent's ADA claim where "it plainly appears that the appellant was fired because of his misconduct [being drunk on duty], not because of his alcoholism"); Rodgers v. County of Yolo Sheriff's Dep't, 889 F.Supp. 1284, 1291 (E.D. Ca. 1995) (granting employer's summary judgment motion in Rehabilitation Act case involving an alcoholic police officer where evidence was "unrefuted and demonstrates that plaintiff['s] termination was based on poor performance"); see also Collings v. Longview Fibre Co., 63 F.3d 828, 831-32 (9th Cir. 1995) (affirming grant of summary judgment for employer of drug abusing employees where employees failed to rebut employer's contention that they were terminated for drug-related misconduct; specifically, no showing that other employees had been treated differently for engaging in similar conduct and no showing that employer knew employees were former drug abusers), cert. denied, 116 S.Ct. 711 (1996). Here, had Burch requested a cognizable (and reasonable) accommodation, and had he been a qualified individual with a disability, the jury arguably would have been free to reject Coca-Cola's proffered nondiscriminatory reason for termination. Burch did not so request and was not so qualified. Coca-Cola is correct, however, that a "second chance" or a plea for grace is not an accommodation as contemplated by the ADA. See Siefkin, 65 F.3d at 666 ("Siefkin is not asking for an accommodation; he is not asking the Village to change anything. He is asking for another chance . . . . But the ADA does not require this.").

[15] Coca-Cola, quoting Wells v. Dallas Indep. Sch.

II. Intentional Discrimination

Under Title I of the ADA, an employer cannot discriminate against a "qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement, or discharge of employees." 42 U.S.C. § 12112(a). In order to establish a prima facie case of intentional discrimination under the ADA, this Circuit has required a plaintiff to present either direct evidence of discrimination or show "'(1) he or she suffers from a disability; (2) he or she is qualified for the job; (3) he or she was subject to an adverse employment action; and (4) he or she was replaced by a non-disabled person or was treated less favorably than non-disabled employees.'" Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995); (citing McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1824 (1973)).

Dist., 793 F.2d 679, 684 (5th Cir. 1986), further argues for a new trial because the size of the jury verdict----over $7 million prior to remittitur----was "'so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive.'" Although our decision obviates the need to reach this issue, we note that even had Burch's case not suffered from the evidentiary deficiencies we find dispositive, a jury's verdict so grossly excessive as this would most probably warrant a new trial under the standard set forth in Wells. Burch's argument that because his counsel requested $56 million from the jury----an amount argued to represent one day of Coca-Cola's net profits per day the jury heard the trial----the lower figure awarded "shows that [the jury] was not unduly prejudiced in Burch's favor" is not persuasive.

At the close of Burch's case, Coca-Cola moved for judgment as a matter of law on Burch's intentional discrimination claim pursuant to Rule 50. Coca-Cola based its motion on the grounds that Burch had not established that his alcoholism was a disability, that Burch had demonstrated neither that he had been replaced by a nonalcoholic employee nor that nonalcoholic employees had been treated more favorably, and that Burch had not shown any direct evidence of discriminatory motive on the part of Coca-Cola. The magistrate judge granted Coca-Cola's motion without stating specific grounds.

Burch argues that the magistrate judge's ruling was premised on an erroneous understanding of the prima facie elements of an intentional discrimination claim under the ADA. Specifically, Burch contends that the magistrate judge granted Coca-Cola's motion because Burch had failed to present evidence that he had been replaced by a someone who was not disabled (without permitting him to demonstrate disparate treatment). Such a position, Burch argues, is contrary to our established caselaw setting forth the prima facie case for intentional discrimination under the ADA. Amicus Curiae EEOC, which also understands the magistrate judge to have precluded Burch from advancing disparate treatment proof, urges reversal of that ruling.[16]

Coca-Cola argues that the magistrate judge's ruling is supportable on each of its three asserted grounds and that any confusion as to the ruling is explainable by the

---

[16] The EEOC took no position on any other issue in this appeal.

responses given by Burch's counsel in argument on the motion.[17]

Because Burch failed to establish that he suffered from a disability as that term is defined in the ADA, and because such a failure is fatal to his ADA intentional discrimination claim, we affirm the magistrate judge's grant of Coca-Cola's Rule 50 motion on that basis. Accordingly, we do not address whether Burch's disparate treatment evidence would have been sufficient to establish the fourth element of his prima facie case.

The ADA defines "disability" alternatively. A plaintiff who sues on an intentional discrimination theory can rely on any of the three alternatives. The ADA provides:

"The term 'disability' means, with respect to an individual--

---

[17] There is some merit to Coca-Cola's contention. Burch's counsel argued before the trial court not that Burch had to demonstrate either that he had been replaced by a nondisabled employee or was treated less favorably than nondisabled employees, but rather that he was required to demonstrate neither. Burch's counsel argued that, under the rule set forth in Doe v. Kohn Nast & Graf, P.C., 862 F.Supp. 1310, 1318 & n.5 (E.D. Pa. 1994), the fourth prong of the McDonnell Douglas standard was inapplicable in a wrongful termination claim. Of course we have never so held and Burch does not advance this argument on appeal. See Daigle, 70 F.3d at 396.

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

A. Substantially Limiting Impairment

For the reasons set forth above, see supra part I.A., we hold that Burch failed to establish that his alcoholism ever substantially limited a major life activity, including the major life activity of working.

B. Record of an Impairment

The ADA does not define "record of such an impairment," but the regulations and the interpretive guidance promulgated by the EEOC make clear that Burch, at some point in the past, must have met or been classified as meeting the standard set forth in section 12102(2)(A). The regulations provide:

"(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more of the major life activities." 29 C.F.R. § 1630.2(k) (1996) (second emphasis added).

The interpretive guidance also stresses that "[t]he impairment indicated in the record must be an

impairment that substantially limits one or more of the individual's major life activities." 29 C.F.R. § 1630, App. (1996).

Burch's argument that he had a record of an impairment when Coca-Cola fired him rests entirely on the assumption that his alcoholism substantially limited a major life activity prior to his treatment at Charter. We have already rejected this contention. At most, Burch had a record of treatment for alcohol abuse and/or alcoholism. That Burch's alcoholism was severe enough to warrant treatment does not establish a record of a disability. As we have determined that Burch offered insufficient evidence establishing that even his untreated alcoholism substantially limited any major life activity, we fail to see how treatment for a nondisability alters his status in any significant way. Accordingly, we hold that Burch was not an individual with a record of an impairment that substantially limited any major life activity under section 12102(2)(B).

C. Regarded as Having an Impairment

"One is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment." Bridges v. City of Bossier, 92 F.3d 329, 332 (5th Cir. 1996) (citing Dutcher, 53 F.3d at 727-28 n.19), cert. denied, 117 S.Ct. 770 (1997).

Whether Burch qualifies under the "regarded as" prong turns on whether the evidence supports such a finding under the first or third definition.[18] Both definitions require Coca-Cola to have perceived Burch's alcoholism as substantially limiting when, in fact, it was not. Burch does not argue that Coca-Cola regarded his alcoholism as disabling and such a finding is not supported by the record. Coca-Cola unquestionably considered Burch to be an alcohol abuser and concedes that alcohol consumption may have induced the conduct for which it claimed Burch was fired. Burch's testimony, and that of Dr. Nace, would also support a jury finding that Coca-Cola regarded Burch as suffering from alcoholism, as that condition was defined at trial. But, as in our discussion of actual disabilities, we do find the evidence insufficient to support a finding that Coca-Cola regarded Burch as anything other than what he actually was: an alcoholic whose alcoholism did not substantially impair any major life activity, including the major life activity of working.

We find guidance in our recent decision in City of Bossier. In City of Bossier, we held that, in order for an employer to have regarded an impairment as substantially limiting in the activity of working, the employer must regard an individual as significantly restricted in the ability to perform a class or a broad

---

[18] The record evidence does not show that negative reactions by others toward known alcoholics substantially limited Burch in any manner. Dr. Nace testified only that a "skidrow image" of alcoholics has persisted. There was no evidence suggesting that Coca-Cola employees embraced this view and we will not presume that its prevalence is so pervasive.

range of jobs. 92 F.3d at 332. Burch produced no evidence that Coca-Cola regarded him to be so limited.

Coca-Cola may have been concerned about Burch's acknowledged "inappropriate" behavior, about his short temper, and about a specific instance of off-hour conduct, but Burch offered no evidence that demonstrates Coca-Cola regarded his alcoholism as substantially limiting his ability to work or his other major life activities. The record demonstrates that Coca-Cola was aware of the favorable letters submitted by Drs. Nace and Matamoros at the time of the termination decision. There was no evidence suggesting that Coca-Cola either discredited Burch's physicians' view that Burch's alcoholism would not affect his prospective ability to refrain from inappropriate conduct or that its managers premised their decision on such a position. But, significantly, even if Coca-Cola had considered Burch's alcoholism as an impediment to his position with the company, that would not end our inquiry. Coca-Cola must have understood Burch's alcoholism to preclude employment in an entire class of jobs. Assuming Coca-Cola regarded his alcoholism as precluding employment as an area service manager with direct reporting authority over approximately twenty employees and a wide geographic area, such a conclusion falls far short of the standard set forth in City of Bossier. Id. at 334 (finding that an impairment that precluded employment in any position "involving routine exposure to extreme trauma" precluded only a "narrow range of jobs"); see also Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) ("restrictions against working with meat products in a cold environment . . . only appeared to prevent [plaintiff] from performing a narrow range of meatpacking jobs"). The record is silent as to any

conception, or misconception, held by Coca-Cola that alcoholism, alone, renders an alcoholic employee substantially impaired. Indeed, the fact that Coca-Cola had in place an employee assistance program designed to assist employees who may be experiencing problems with alcohol through referrals and counseling weighs in favor of the opposite conclusion.

As there was insufficient evidence to establish that Coca-Cola regarded Burch as disabled, and because Burch did not otherwise establish that he met the statutory definition of disabled, we hold that Burch failed to meet the prima facie elements of intentional discrimination under the ADA. Coca-Cola's motion for judgment as a matter of law was properly granted on Burch's intentional discrimination claim.

III. Defamation

Burch appeals the magistrate judge's grant of summary judgment in favor of Coca-Cola on his Texas law defamation claim. Burch argues that two statements by Coca-Cola were defamatory. The first was a statement by Charles Rose, an employee in Coca-Cola's human resources department, to Drake, Beam & Morin to the effect that Burch had been terminated for violent and threatening behavior. The second, from Cutshall to Smith, communicated a somewhat similar message. The magistrate judge granted summary judgment on the ground that these statements were opinion and, as such, were not actionable under Texas law. Memorandum Order at 1 (N.D. Tex. Jun. 7, 1995) (citing Schauer v. Memorial Care Sys., 856 S.W.2d 437, 446 (Tex. App.--Houston 1993, no writ)).

Coca-Cola argues that summary judgment was appropriate because both statements were opinion and, alternatively, that Rose's statement to Drake, Beam & Morin was protected by the common interest privilege. Burch argues that any privilege that Coca-Cola might have had concerning the statements made to Drake was waived by Cutshall's statement to Smith, who was no longer affiliated with Coca-Cola at the time the statement was made.

Finding the statement from Rose to Drake, Beam & Morin protected by the common interest privilege, and finding that the statement from Cutshall to Smith does not support a defamatory meaning, we find no error in the magistrate judge's grant of summary judgment in favor of Coca-Cola.

"Slander is a defamatory statement orally communicated or published to a third person without legal excuse." Halbert v. City of Sherman, 33 F.3d 526, 530 (5th Cir. 1994); Randall's Food Mkts, Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995). "Accusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege." ContiCommidity Servs., Inc. v. Ragan, 63 F.3d 438, 442 (5th Cir. 1995) (citing Schauer, 856 S.W.2d at 449), cert. denied, 116 S.Ct. 1318 (1996). This privilege extends to statements made in good faith by a former employer to a prospective employer, see Pioneer Concrete of Texas, Inc. v. Allen, 858 S.W.2d 47, 49 (Tex. App.--Houston 1993, writ denied), and those made to agencies engaged in placement services, id. at 50. The privilege can be defeated by showing actual malice or an abuse of the

privilege. ContiCommodity, 63 F.3d at 442; Randall's, 891 S.W.2d at 646.

Burch argues that, although Pioneer held that statements made to placement agencies are covered by the conditional privilege, Rose's statement was not privileged because Drake, Beam & Morin was not a placement firm but rather a firm specializing in employment counseling. We find the distinction insufficient to defeat the privilege.

The privilege described in Pioneer was nothing more than a practical application of Texas's common-interest privilege, which recognizes that public or private interests in the availability of correct information can be of sufficient importance to require protection of the honest communication of misinformation. Pioneer, 858 S.W.2d at 50 (citing Kaplan v. Goodfried, 497 S.W.2d 101, 105 (Tex. App.--Dallas 1973, no writ)). Accordingly, voluntary communications, in addition to communications in response to a request, are privileged "'if the relationship between the parties is such that it is within generally accepted standards of decent conduct to furnish the information for the protection of the recipient.'" Id. (quoting Kaplan, 497 S.W.2d at 105-06).

The communication between Rose, a Coca-Cola human resources employee, and the offices of Drake, Beam & Morin were privileged under Texas's common-interest privilege. First, there was uncontroverted testimony that the standard practice for Drake Beam in particular, and among employment counseling firms in general, was to utilize the reasons for an employee's termination to aid in that employee's employment counseling preparation. Second, there was no evidence suggesting that Rose acted with any purpose other than to assist Burch's search for

subsequent employment.[19] Accordingly, we hold that the

[19] Rose testified:

"Q. Was it your practice to tell the out-placement service the reason for an employee's termination?

A. Yes.

Q. Why is that?

A. There is actually a number of reasons, but the main reason is that it helps the out-placement service do a better job counseling the employee to find their [sic] next job.

. . . .

Q. Tell me how it would help Mr. Burch for Drake Beam & Morin to know that Coca-Cola had terminated him for violent and threatening behavior?

A. A couple of different ways. Drake Beam has a number of different kinds of counselors available to them. It would help them select the person----the person best qualified and best suited to help him from their staff. And secondly, they need to coach their clients on how to answer questions when they get into an interview situation.

. . . .

Q. Have you ever given that type of information about why an employee was discharged to Drake Beam in the past?

A. Yes.

Q. And relating to other employees?

A. Yes.

Q. Have you provided similar information to other out-placement counseling firms other than Drake Beam in other cases?

A. Yes.

Q. In your experience, is that the type of information that Drake Beam wanted to have?

A. Yes.

. . . .

Q. And why is that?

statements made by Rose to Drake Beam were privileged and that Burch failed to establish that Rose, acting on behalf of Coca-Cola, acted with actual malice so as to defeat the privileged nature of the statements.[20]

Burch also asserts that, even if Rose's communication was privileged, Cutshall's communication of similar information to Smith waived the privilege. We disagree. The common-interest privilege is not waived by an unrelated communication of similar information on a separate occasion to a former employee who may be asked to provide a recommendation.

A. When I am on the phone with Drake Beam, they ask me why a person has been terminated."

Rose's affidavit stated:

"The information I provided to Drake Beam was of the type customarily provided to an outplacement firm, and was necessary to enable Drake Beam to effectively provide its services to plaintiff. In accordance with our established business relationship, this information was considered by Coca-Cola and Drake Beam to be strictly confidential."

[20] "'Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true.'" Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 313 (5th Cir. 1995) (quoting Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989)). The absence of an additional investigation as to the truth or falsity of a statement has been held insufficient to establish actual malice. Id. (citing Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 924 (Tex. App.--Corpus Christi 1991, writ dismissed w.o.j.)).

The conditional, common-interest privilege "remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate." Randall's, 891 S.W.2d at 646; Reeves v. Western Co. of N. Am., 867 S.W.2d 385, 394 (Tex. App.--San Antonio 1993, writ denied); Perry Bros. Variety Stores, Inc. v. Layton, 25 S.W.2d 310 (Tex. Comm'n App. 1930, judgm't adopted). Here, however, Burch does not contend that Rose's statement to Drake Beam was communicated, or overheard, by any person not covered by the privilege. Rather, Burch argues that a separate, second statement made on a different occasion, by a different person, and to a different person, communicated at a different time not established by the record, worked a waiver of the privilege that had attached to the statement to Drake Beam. Waiver occurs where the allegedly defamatory statement was made to those outside the interest group. This was not established. See Mitre v. Brooks Fashion Stores, Inc., 840 S.W.2d 612, 619 (Tex. App.--1992, writ denied) (reversing summary judgment because whether a flyer accusing plaintiffs of passing counterfeit bills "was published only to shop employees, or also to the general public" was a fact issue relating to the privilege); Layton, 25 S.W.2d at 313 ("[T]he defamatory statements of Barr lost their privileged character by reason of the fact that same were made in a store open to the general public, and in the presence and hearing of customers who were there . . . and who had no interest in the subject matter of the statements."); see also Danawala v. Houston Lighting & Power Co., 14 F.3d 251, 255 (5th Cir. 1993) (finding "secondary publications" by unauthorized gossip by co-workers did not waive the privilege).

Burch also contends that some time after he was terminated Cutshall defamed him in a telephone conversation with Smith, who was then employed by another company. The only evidence concerning this conversation is Cutshall's deposition testimony. Cutshall there stated he called Smith in order to obtain a favorable reference for Burch, believed that Smith asked him why Burch had been terminated, and that he told Smith "what had been relayed to me as to what had happened," that he did not recall saying Burch had engaged in "violent" behavior, but had "used the word threatening behavior, menacing behavior toward another employee." Nothing more is shown concerning what Cutshall said to Smith. Given the context of Cutshall's conversation, and the undisputed evidence that Burch, a physically imposing 6'5", 223 pounds, at the least had become visibly and obviously very angry at the meeting and mouthed hostile vulgarities to and pointed at a fellow employee there, gesturing with his head for the two of them to go outside, we conclude that this mere snippet of testimony from Cutshall's deposition does not suffice to establish that Cutshall falsely defamed Burch.

Coca-Cola argues that "[i]t is well-settled Texas law that mere statements of opinion are protected as free speech and cannot form the basis of a cause of action for defamation." Burch argues that Coca-Cola's reading of Texas law relies on an abandoned adherence to Gertz v. Robert Welch, Inc., 94 S.Ct. 2997 (1974), and that Texas now follows the view, expressed in Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990), that statements of opinion may be actionable if they imply an assertion of objective fact. We find no inconsistency between the cases cited by Coca-Cola and those cited by Burch. Texas case law plainly protects those communications that are not

objectifiably verifiable. See Carr v. Brasher, 776 S.W.2d 567; Simmons v. Ware, 920 S.W.2d 438 (Tex. App.--Amarillo 1996); Schuller v. Swan, 911 S.W.2d 396 (Tex. App.--Corpus Christi 1995); Schauer, 856 S.W.2d 437; Shearson Lehman Hutton, 806 S.W.2d 914; Yiamouyiannis v. Thompson, 764 S.W.2d 338 (Tex. App.--1988, writ denied), cert. denied, 110 S.Ct. 722 (1990). "'A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury.'" McKethan v. Texas Farm Bureau, 996 F.2d 734, 743 (5th Cir. 1993) (quoting Einhorn v. LaChance, 823 S.W.2d 405, 410-11 (Tex. App.--Houston 1992, writ dismissed w.o.j.) (holding statement that an employee was fired for reasons relating "solely to work performance" was not defamatory because it was nonspecific)), cert. denied, 114 S.Ct. 694 (1994). "'Whether the words are reasonably capable of the defamatory meaning the plaintiff attributed to them is a question of law for the trial court.'" Id. (quoting Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 91 (Tex. App.--Corpus Christi 1992, writ refused)). The allegedly defamatory statement must be considered in context and in light of the circumstances surrounding its publication. Id.

We hold that, given the uncontroverted purpose of the communication from Cutshall to Smith----to obtain a favorable recommendation for Burch----and the vague and general nature of the statement made, as well as Burch's admitted conduct at the meeting, Cutshall's statement was not falsely defamatory.

Cutshall testified that his remarks were made for the purpose of obtaining a favorable recommendation. There was no evidence that Cutshall provided any factual

information to Smith other than characterizing the nature of Burch's termination. Cutshall testified that he told Smith "what had been relayed to me as to what had happened." Burch testified that Smith had reviewed his prior performance favorably in evaluations and was aware of Burch's professional ability. Given Cutshall's communicated purpose----to obtain a favorable recommendation----and in light of the circumstances surrounding the statement, we find that no reasonable jury could find that Cutshall's remarks rose to the level of actionable defamation under Texas law.

Conclusion

For the foregoing reasons, we affirm the magistrate judge's grant of judgment as a matter of law on Burch's ADA intentional discrimination claim, affirm the grant of summary judgment on Burch's defamation claim, and reverse the denial of Coca-Cola's motion for judgment as a matter of law on Burch's ADA reasonable accommodation claim. Accordingly, the judgment of the trial court is REVERSED and the cause is REMANDED with instructions to enter judgment dismissing all of Burch's claims against Coca-Cola.

AFFIRMED in part; and REVERSED and REMANDED with instructions

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT P. BURCH,	§	
Plaintiff,	§	
	§	
V.	§	NO. 3:94CV1894BD
	§	
THE COCACOLA	§	
COMPANY,	§	
Defendant.	§	

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Jeff Kaplan, Magistrate Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, the sum of $109,000.00 for back pay with prejudgment interest thereon at the rate of 10% per annum from the date each payment became due which amount totals $12,481.05 for prejudgment interest on back pay.

It is Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, the sum of $300,000.00 for compensatory damages. Because the statutory cap on compensatory and punitive damages pursuant to 42 U.S.C. § 1981a(b)(3)(D) is $300,000.00, the Court reduces the jury's award of $6,000,000.00 for punitive damages to $0.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola

Company, the sum of $294,777.58 which amount represents the present value of five years of front pay.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, the sum of $208,072.00 for reasonable attorney's fees incurred in the preparation and prosecution of Plaintiff's claims under the Americans With Disabilities Act.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, his costs of court.

It is further Ordered and Adjudged that Plaintiff, Robert P. Burch, recover of Defendant, The CocaCola Company, postjudgment interest on all amounts awarded from the date of Judgment until paid pursuant to 28 U.S.C. § 1961 at the rate of 5.52% per annum.

Signed this 25th day of September, 1995.

/S/
PRESIDING JUDGE

AGREED AS TO FORM ONLY:

/s/
Jennifer Judin,
Attorney for Plaintiff

/s/
Stuart Tonkinson,

Supreme Court, U.S.
FILED
DEC 11 1997
CLERK

(2)

No. 97-0791

In The

Supreme Court of the United States

October Term, 1997

ROBERT BURCH,

Petitioner,

vs.

THE COCA-COLA COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARK SNYDERMAN
ROBERT A. BOAS
THE COCA-COLA COMPANY
P.O. Drawer 1734
Atlanta, GA 30301
(404) 676-2121

NANCY L. ABELL*
PAUL, HASTINGS, JANOFSKY & WALKER LLP
1299 Ocean Avenue, Fifth Floor
Santa Monica, CA 90401
(310) 319-3219

Attorneys for Respondent The Coca-Cola Company

**Counsel of Record*

21 pp

TABLE OF CONTENTS

Cases **Page(s)**

RESPONDENT'S BRIEF IN OPPOSITION 1

ARGUMENT 2

I. The Fifth Circuit's Holding That Alcoholics (Like Anyone Else Seeking ADA Protection) Must Prove a "Substantial Limitation of a Major Life Activity" Is Consistent with the Law in Every Federal Circuit 2

II. Burch Seeks Certiorari Based on a Mischaracterization of the Fifth Circuit's Decision Regarding Reasonable Accommodation; The Court Held Only That a Request for Reinstatement Is Not a Request for an Accommodation 8

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page(s)**

Altman v. New York City Health & Hosps. Corp.,
100 F.3d 1054 (2d Cir. 1996) 6

Aucutt v. Six Flags Over Mid-Am., Inc.,
85 F.3d 1311 (8th Cir. 1996)..... 4

Beck v. University of Wis. Bd. of Regents,
75 F.3d 1130 (7th Cir. 1996)..... 11

Bragdon v. Abbott,
No. 97-156..... 14

Brundage v. Hahn,
57 Cal. App. 4th 228 (1997)..... 11

Buckingham v. United States,
998 F.2d 735 (9th Cir. 1993)..... 12

Butler v. Thornburgh,
900 F.2d 871 (5th Cir.),
cert. denied, 498 U.S. 998 (1990) 8

Castle v. Bentsen,
867 F. Supp. 1 (D.D.C. 1994),
aff'd, 78 F.3d 654 (D.C. Cir. 1996)..... 3

Cases **Page(s)**

Crewe v. United States Office of Personnel Management,
834 F.2d 140 (8th Cir. 1987)..... 7

Demming v. Housing & Redev. Auth.,
66 F.3d 950 (8th Cir. 1995)..... 6

Despears v. Milwaukee County,
63 F.3d 635 (7th Cir. 1995)..... 8

Fuller v. Frank,
916 F.2d 558 (9th Cir. 1990)..... 7, 11

Graehling v. Village of Lombard,
58 F.3d 295 (7th Cir. 1995)..... 8

Heilweil v. Mount Sinai Hosp.,
32 F.3d 718 (2d Cir. 1994),
cert. denied, 513 U.S. 1147 (1995)..... 4

Homeyer v. Stanley Tulchin Assocs.,
91 F.3d 959 (7th Cir. 1996)..... 12

Johnson v. New York Hosp.,
96 F.3d 33 (2d Cir. 1996)..... 7

Kocsis v. Multi-Care Management, Inc.,
97 F.3d 876 (6th Cir. 1996)..... 4

Cases **Page(s)**

Little v. FBI,
1 F.3d 225 (4th Cir. 1993) 8

Maddox v. University of Tenn.,
62 F.3d 843 (6th Cir. 1995) 6, 7, 13

McWright v. Alexander,
982 F.2d 222 (7th Cir. 1992) 12

Newland v. Dalton,
81 F.3d 904 (9th Cir. 1996) 6, 8

Rodgers v. Lehman,
869 F.2d 253 (4th Cir. 1989) 7

Sanders v. Arneson Prods., Inc.,
91 F.3d 1351 (9th Cir. 1996),
cert. denied, 117 S. Ct. 1247 (1997) 3

School Bd. v. Arline,
480 U.S. 273 (1987) 5

Siefken v. Village of Arlington Heights,
65 F.3d 664 (7th Cir. 1995) 10

Simpson v. Reynolds Metals Co.,
629 F.2d 1226 (7th Cir. 1980) 7

Soileau v. Guilford of Maine, Inc.,
105 F.3d 12 (1st Cir. 1997) 4

Cases **Page(s)**

Stewart v. County of Brown,
86 F.3d 107 (7th Cir. 1996)..... 3

Taylor v. United States Postal Serv.,
946 F.2d 1214 (6th Cir. 1991)..... 6

Teahan v. Metro-North Commuter R.R.,
80 F.3d 50 (2d Cir. 1996)..... 7, 13

Tinch v. Walters,
765 F.2d 599 (6th Cir. 1985)..... 7

Williams v. Widnall,
79 F.3d 1003 (10th Cir. 1996)..... 8

Statutes

42 U.S.C. §§ 12101-12213..... 1

42 U.S.C. § 12102(2)..... 3

42 U.S.C. § 12102(2)(A)..... 14

42 U.S.C. § 12112(b)(5)..... 9

42 U.S.C. § 12114(c)(4)..... 2

Other

29 C.F.R. § 1630, App. (1997)..... 3

EEOC Compliance Manual § 902.4(d) 5-6

RESPONDENT'S BRIEF IN OPPOSITION

The Fifth Circuit in this case applied well-established law to reach a predictable disposition: An employee who failed to prove that he was substantially limited in any major life activity at the time of his alcohol-induced misconduct or consequent termination is not entitled to recover under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213.

Petitioner Robert Burch ("Burch") produced insufficient evidence that "his alcoholism ever substantially impaired any major life activity," that he was an individual with a record of such an impairment, or that his employer, respondent The Coca-Cola Company ("Coca-Cola"), ever regarded him as so limited. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 35a-39a. The absence of such evidence not only defeats Burch's reasonable accommodation and intentional discrimination claims on the merits, but also disposes of all claims addressed in the Petition. The Fifth Circuit did not require Burch to demonstrate a "secondary impairment," as Burch contends, but merely required *some* impairment that rose to the level of a substantial limitation, as the ADA plainly requires and as every circuit to examine the issue has concluded. This commonplace fact-specific determination presents no issue worthy of this Court's review.

Nor did the Fifth Circuit break new ground in holding that Burch's termination for his admittedly inappropriate on-the-job conduct, while intoxicated, was not a denial of reasonable accommodation. In enacting the ADA, Congress promised employers that they could discharge anyone, including alcoholics, for alcohol-related misconduct. As

Burch himself explains, "employers are permitted to hold an alcoholic to the same qualification standards for employment or job performance and behavior that it [*sic*] holds other employees, even if any unsatisfactory performance or behavior is related to alcoholism. 42 U.S.C. § 12114(c)(4)." Pet. at 19. Burch did not seek a reasonable accommodation for his alleged disability; he sought reinstatement following his work-related misconduct while intoxicated. Burch is able to conclude that the Fifth Circuit's decision is in conflict with the decisions of other federal circuits only by mischaracterizing the Fifth Circuit's holding on reasonable accommodation. The Fifth Circuit concluded — correctly, and consistently with other circuits — that employers have the right to terminate, rather than reinstate, following alcohol-induced misconduct. There is nothing more to this case.

ARGUMENT

I. The Fifth Circuit's Holding That Alcoholics (Like Anyone Else Seeking ADA Protection) Must Prove a "Substantial Limitation of a Major Life Activity" Is Consistent with the Law in Every Federal Circuit

The Fifth Circuit's decision is not a "portentous deviation from the clear language of the statute and established precedent," Pet. at 13, but a careful application of the statute and the regulations to a particular set of facts. Every other circuit has applied the ADA in precisely the same manner, and has reached decisions that are fully consistent with this one.

The Fifth Circuit did *not* hold, as Burch contends, "that for alcoholism to be an actionable disability under the ADA, an individual must demonstrate, in addition to his alcoholism, a permanent secondary impairment caused by the alcoholism." Pet. at 13. Rather, the court applied the statute by its terms, holding that ADA coverage arises only if an employee's alleged impairment — here, alcoholism — in fact "substantially limits one or more of the major life activities of such individual," or the individual has "a record of such impairment" or is "regarded as having such an impairment." 42 U.S.C. § 12102(2). *See* Pet. App. at 17a, 35a. *See also* 29 C.F.R. § 1630, App. (1997) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). Every circuit has engaged in such fact-specific analyses: An ADA plaintiff must demonstrate an actual substantial limitation (or the record or perception of one).[1]

---

1 *See Castle v. Bentsen*, 867 F. Supp. 1 (D.D.C. 1994) (demonstrating disability requires "more than a showing that the plaintiff has a blood condition"; rather, plaintiff must present evidence that the condition substantially limits a major life activity), *aff'd*, 78 F.3d 654 (D.C. Cir. 1996); *Stewart v. County of Brown*, 86 F.3d 107, 111 (7th Cir. 1996) (plaintiff diagnosed as suffering from depression, and whose employer "considered [him] to be emotionally or psychologically imbalanced [and] temperamentally unfit to serve as a sheriff's deputy," produced insufficient evidence to demonstrate that the employer perceived the depression as substantially limiting); *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (plaintiff's four-month "psychological reaction" to bladder cancer "had no long-term residual effects" and was "not of sufficient duration to fall within the protections of the ADA as a disability."), *cert. denied*, 117 S. Ct. 1247 (1997); (continued)

The Fifth Circuit sifted methodically through the trial record for evidence to support Burch's "assertion that his alcoholism made him a 'qualified individual with a disability,'" Pet. App. at 18a, but found none. The court concluded that "there is insufficient evidence in the record to support a jury finding that Burch ever suffered a substantial impairment of a major life activity, much less that he did so on or after October 27, 1993," *id.* at 24a, a date preceding his termination. Nor was there sufficient evidence that he had a record of such a limitation or that Coca-Cola regarded him as

---

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 14-17 (1st Cir. 1997) (engineer who suffered from a life-long dysthymic disorder was not substantially limited in a major life activity even though he was unable to get along with others); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 718-20, 724 (2d Cir. 1994) (discharged plaintiff whose asthma was exacerbated by air in workplace and precluded her continued employment there was not a person with a protected disability "[b]ecause her asthmatic condition did not substantially limit a major life activity — either her ability to breathe or work"), *cert. denied*, 513 U.S. 1147 (1995); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884 (6th Cir. 1996) ("[a]lthough both arthritis and MS can be disabling in some instances, they were not so substantially limiting in this case."); *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (plaintiff, who suffered from angina, high blood pressure, and coronary artery disease, failed to present sufficient evidence to establish that he was substantially limited in any major life activity given that the only limitation resulting from his medical condition was a 25-pound lifting restriction and difficulty completing an employee obstacle course).

so limited. *Id.* at 35a, 39a.[2] This fact-specific determination raises no legal issue of importance to this Court.

The Fifth Circuit made no blanket pronouncement about alcoholism. To the contrary, the court properly observed that "[t]his is not to say that an alcoholic can never demonstrate a substantially limiting impairment." *Id.* at 21a n.9. But the court found "no evidence in the legislative history or elsewhere of a congressionally conferred exemption for alcoholics from the rigors of the scheme set forth in the ADA." *Id.* at 25a n.10. The decision is unquestionably correct and consistent with the law of every circuit.[3]

---

2 These conclusions are hardly surprising. The robust 6'5," 223-pound Burch

> offered no testimony that his alcoholism-induced inebriation permanently altered his gait, his ability to speak properly, his memory when sober, or produced long-term insomnia. In fact, when Burch began treatment for his alcoholism in late September 1993, he reported to Charter Hospital that he had been bicycling recreationally between 100 and 200 miles a week. Burch concedes that, prior to his paid leave to undergo treatment, his work was unaffected by his alcoholism. Burch testified that he never drank during working hours.

Pet. App. at 21a n.9. Although Burch states that "[h]e had blackouts when drinking and suffered from insomnia and depression," Pet. at 7, the record is devoid of proof as to when and how frequently that occurred.

3 Burch cites *School Board v. Arline*, 480 U.S. 273, 279-81 (1987), a pre-ADA case under the Rehabilitation Act, for the proposition that hospitalization is sufficient to establish a substantial limitation of a major life activity under the ADA. That is plainly not the law. EEOC (continued)

Burch makes the misleading assertion that "[e]very other circuit court case which has dealt with the disability of alcoholism under the ADA and the Rehabilitation Act has treated, without question, or assumed, that a person suffering from the disease of alcoholism is an individual with a disability or a handicap." Pet. at 17. Many of the decisions he cites have *assumed* that alcoholism is a covered impairment,[4] but not one case has held, or even intimated, that a plaintiff whose alcoholism does not substantially limit a major life activity is covered by the ADA.[5]

Compliance Manual § 902.4(d) ("[t]he mere fact that an individual may require . . . hospitalization" or even "the necessity of surgery" does not automatically mean the condition is a disability); *Demming v. Housing & Redev. Auth.*, 66 F.3d 950, 955 (8th Cir. 1995) (hospitalization for thyroid cancer not enough to establish disability); *Taylor v. United States Postal Serv.*, 946 F.2d 1214, 1217 (6th Cir. 1991) (*Arline* should not be read "as establishing the nonsensical proposition that any hospital stay is sufficient to evidence a 'record of impairment'" under the Rehabilitation Act.).

4 *Maddox v. University of Tenn.*, 62 F.3d 843, 846 (6th Cir. 1995) ("[W]e assume, without deciding, that alcoholics *may* be 'individuals with a disability' for purposes of the Act."; summary judgment for employer affirmed) (emphasis added); *Altman v. New York City Health & Hosps. Corp.*, 100 F.3d 1054, 1060 (2d Cir. 1996) (no analysis of "substantially limited" issue; affirming summary judgment for employer on alcoholic's claim because plaintiff was not "qualified"); *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (affirming grant of motion to dismiss; misconduct bars ADA claim; no discussion of whether plaintiff was substantially limited in a major life activity).

5 Several of Burch's citations have no instructive value because they arose before the effective date of the 1992 amendments to the Rehabilitation Act. Those amendments eliminated an earlier requirement (continued)

Rather, the courts in the cases Burch cites essentially pretermitted the issue of disability and held in favor of the *employer* on a ground that defeats Burch's case as well: An alcoholic who engages in inappropriate conduct resulting from drinking is not excused from the consequences of the misbehavior because of a disability. *Teahan v. Metro-North Commuter R.R.*, 80 F.3d 50, 51-53 (2d Cir. 1996) (court found "not otherwise qualified" a drug and alcohol abuser, who had a history of absenteeism that he attributed to substance abuse, sought help from the employee assistance program for that problem, entered a voluntary inpatient rehabilitation program, and was notified of employer's intent to discharge for excessive absenteeism while he was in that program); *Maddox v. University of Tenn.*, 62 F.3d 843, 847 (6th Cir. 1995) (assistant football coach arrested for driving under the influence of alcohol while off duty, and terminated while enrolled in an alcohol rehabilitation program and on paid administrative leave, states no claim under the ADA; "to hold otherwise, an employer would be forced to accommodate all behavior of an alcoholic [employee] which could in any way be related to the alcoholic's use of intoxicating beverages").[6]

---

to give alcoholics an option for treatment. *See Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985); *Crewe v. United States Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987); *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989); *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990).

6 *See also Johnson v. New York Hosp.*, 96 F.3d 33, 34 (2d Cir. 1996) (alcoholic who came to the hospital in an intoxicated state during his vacation properly terminated; "Numerous courts have considered off-duty drunken conduct in determining whether the plaintiff was protected (continued)

II. Burch Seeks Certiorari Based on a Mischaracterization of the Fifth Circuit's Decision Regarding Reasonable Accommodation; The Court Held Only That a Request for Reinstatement Is Not a Request for an Accommodation

The Fifth Circuit had no need to reach the question of reasonable accommodation because Burch had failed to produce sufficient evidence to demonstrate that he suffered a disability requiring ADA protection. Nonetheless, the court also concluded that Coca-Cola could not be held liable for failing to accommodate Burch because Burch never asked for an accommodation — he asked only to return to work following termination for cause:

---

under the Rehabilitation Act. . . . To turn a blind eye towards such conduct is justified neither by logic nor sound policy."); *Little v. FBI*, 1 F.3d 225, 259 (4th Cir. 1993) ("[B]ased on no lesser authority than common sense, it is clear that an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped."); *Butler v. Thornburgh*, 900 F.2d 871, 876 (5th Cir.) (affirming trial court's dismissal of a claim by an alcoholic FBI agent), *cert. denied*, 498 U.S. 998 (1990); *Graehling v. Village of Lombard*, 58 F.3d 295, 296, 299 (7th Cir. 1995) (firing an individual whose alcoholism interfered with his job did not violate the law); *Despears v. Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995) (employer not required to overlook drunk driving by an alcoholic); *Newland v. Dalton*, 81 F.3d 904, 905 (9th Cir. 1996) (termination for "disgraceful conduct" caused by alcoholism not a violation of Rehabilitation Act); *Williams v. Widnall*, 79 F.3d 1003, 1007 (10th Cir. 1996) ("[T]he [ADA] does not protect alcoholics or drug addicts from the consequences of their misconduct. . . ;" employer's decision to terminate before alcoholic had undergone "inpatient treatment for a sufficient period of time" is not a failure of reasonable accommodation) (citation omitted).

> Burch failed to establish that he ever requested any modification or adjustment to his job as an area service manager with Coca-Cola. A wrongful termination claim under the ADA is not properly analyzed under a reasonable accommodation theory unless an employer is shown to have terminated a qualified individual with a disability in order to avoid accommodating that employee's impairments at the workplace.
>
> Accordingly, an employee who requests only the opportunity to return to an unmodified, previously-held position fails to state a cognizable claim under 42 U.S.C. § 12112(b)(5).

Pet. App. at 15a-16a.

Confronted with an employee who blamed his misconduct on his alleged disability,[7] the Fifth Circuit held

---

7 Burch did not simply "mouth[ ] obscenities" at another manager. Pet. at 8. Burch had the leadership responsibility for a Coca-Cola dinner meeting of 35 managers from around the country. RT 831:10-15; 1336:14-1337:1. He testified at trial: "I had consumed alcohol . . . and I got upset and I lost my temper." RT 226:6-7. Burch explained that, after a co-worker insinuated that Burch's manager would like him transferred, he pointed to manager Jerry Allen with his finger, mouthed "f--k you" to him twice, then mouthed "get off my ass," and motioned that he wanted to take it outside. RT 293:16-294:5; 401:19-402:4; 402:13-14; 408:22-409:2. Burch described himself as "red in the face" and "very angry." RT 294:16. Co-workers sitting near him urged Burch to "calm down." RT 295:3-4; 402:23-403:3; 403:9-11. An eyewitness testified: "Burch was enraged. He was out of control. . . . (continued)

that Burch's request for reinstatement after his September 22nd rage attack was a request for a second chance, not a request for a reasonable accommodation. This obvious conclusion is consistent with that of other courts under similar circumstances.

The plaintiff in *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), a police officer, claimed that he suffered a diabetic reaction while in his squad car, causing him to drive erratically and at high speeds through residential areas. The police department subsequently placed him on administrative leave and then terminated him for "failure to alertly and accurately keep [himself] functional and monitor [his] disease." *Id.* at 666. Siefken claimed that, after the incident, he received instruction on how to control his blood sugar and he represented that he would not experience a similar loss of control in the future. Siefken contended that his termination was a denial of reasonable accommodation.

The Seventh Circuit explained that Siefken's requested accommodation — a second chance after treatment — simply was beyond the scope of the ADA:

He was very, very angry, and it made me afraid being there. . . . I thought he wanted to fight Jerry Allen, and anybody . . . that would have been in the way of the two of them would have been at jeopardy." RT 1275:20-23; 1277:15-25. Burch thereafter directed "a very vivid stare . . . just livid with anger" toward Allen for minutes. RT 1278:10-24. Another witness testified, "I had never seen anything like that before in a business setting. . . ." RT 1261:6-7.

> When asked what accommodation Siefken would request, his counsel replied, "A second chance." But this is not an accommodation, as envisioned in the ADA. . . . Siefken is not asking the [employer] to change anything. He is asking for another chance to allow *him* to change his monitoring technique. But the ADA does not require this.

Id. at 666-67. To the same effect are *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990) (if an employer were required to await the outcome of an alcohol treatment program before terminating for misconduct, or reinstate following leave, "an employee could conceivably forestall dismissal indefinitely by repeatedly entering treatment whenever dismissal becomes imminent"); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("An accommodation is something concrete — some specific action required of the employer. . . . [A]sking for a 'second chance' is not an ADA 'accommodation.'"); and *Brundage v. Hahn*, 57 Cal. App. 4th 228, 239-40 (1997) (reasonable accommodation does not include either "excusing a failure to control a controllable disability" or a second chance to control it in the future; "The ADA does not mandate giving a second chance to an employee. . . ."). As Burch's reasonable accommodation claim is nothing more than a request for a second chance, the Fifth Circuit properly ordered judgment entered for Coca-Cola.

Burch seeks to avoid this obvious conclusion — and create an issue for this Court where there is none — by twice recasting the Fifth Circuit's holding on reasonable accommodation. First, Burch takes out of context the Fifth Circuit's statement that Burch's accommodation claim

required him to "demonstrate that a substantially limiting impairment somehow affected his ability to perform his job." Pet. App. at 16a n.4. *See* Pet. at 23. The Fifth Circuit's dictum stands only for the obvious proposition that a reasonable accommodation plaintiff must show that the alleged disability requires some change in working conditions; otherwise, "there would be nothing for an employer to accommodate." Pet. App. at 16a n.4.[8] *See also id.* at 14 a – 15a. The only change Burch requested was that Coca-Cola reverse its decision to discharge him for cause. This is not a reasonable accommodation.

Second, Burch claims that the Fifth Circuit held that leave is not a reasonable accommodation for the disability of alcoholism. Pet. at 27. The Fifth Circuit reached no such conclusion. To the contrary, the court expressly declined to address that issue because Burch's request for reinstatement was not a request for leave:

> Burch does not complain that Coca-Cola ever denied a prospective request for a leave of absence. We therefore have no need to address whether an employer would be required, in certain circumstances, to offer a

---

[8] This rule is consistent with each of the decisions forming Burch's alleged circuit split on this issue; in each of those cases the plaintiff asked for some change in working conditions. *Homeyer v. Stanley Tulchin Assocs.*, 91 F.3d 959 (7th Cir. 1996) (change in environment to minimize effects of tobacco smoke); *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992) (child-care leave for adoptive mother where employer granted such leave to biological mothers); *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) (transfer).

> leave of absence to an employee whose alcoholism qualified as a disability under the ADA.

Pet. App. at 28a n.12.[9]

In fact, prior to Burch's termination, The Coca-Cola Company *did* grant him a leave of absence for treatment. Beginning September 27, 1993, Burch was given the full leave he requested and "remained on full salary throughout his treatment (which was paid for by Coca-Cola's benefit plan) and until his termination." Pet. App. at 10a. Effective November 5, 1993, Burch was released from treatment. RT 675:14-21. According to his own doctor, Burch was not substantially limited in working or any major life activities at that time. RT 697:4-18. Within a day of his release from treatment, Burch was informed that his employment was terminated because of his unacceptable behavior. RT 237:17-18; 1347:12-21. Burch's request to return to work under these circumstances was not a request for leave of absence.

Nothing in the ADA precludes an employer from terminating an employee on alcohol rehabilitation leave for conduct that occurred prior to the leave. *E.g., Teahan v. Metro-North Commuter R.R.*, 80 F.3d 50, 51-53 (2d Cir. 1996); *Maddox v. University of Tenn.*, 62 F.3d 843, 847 (6th Cir. 1995). Contrary to Burch's assertion, leave for

---

9 *See also id.* at 24a ("Under different circumstances – and additional evidentiary support — an alcoholic may establish the need for reasonable accommodation of an alcoholism-induced impairment. Burch simply has not done so.").

treatment does *not* "necessarily impl[y] being able to return after the treatment is complete." *See* Pet. at 28.

The Fifth Circuit's unremarkable holding that an employee need not be reinstated following admitted misconduct, even if the misconduct was caused by a disability, raises no issue for this Court.[10]

---

10 This case is inappropriate for review also because the Fifth Circuit would have rejected the jury verdict even if the court had not reached the conclusions to which Burch objects in his Petition: "[E]ven had Burch's case not suffered from the evidentiary deficiencies we find dispositive, a jury's verdict so grossly excessive as this would most probably warrant a new trial. . . ." Pet. App. at 32a n.15.

Moreover, the Court has no reason to hold this Petition pending the disposition of *Bragdon v. Abbott*, No. 97-156, (*cert. granted* November 26, 1997), an ADA Title III public accommodation case. The principal issues in *Bragdon* are whether asymptomatic HIV-positive status is a disability and whether reproduction is a major life activity. Burch's alcoholism implicates neither issue. The statute, regulations and decisions of all circuits require a two-step analysis to determine whether a claimant has a covered disability. The threshold inquiry is whether the individual has a physical or mental impairment. If so, the second inquiry is whether that impairment "'substantially limits one or more major life activities of such individual.'" Pet. App. at 17a, 19a (citing 42 U.S.C. § 12102(2)(A)). The Fifth Circuit properly concluded that even if Burch's alcoholism was an impairment, he failed to satisfy the second prong of the disability analysis in this case because he did not prove that it was a "substantially limiting impairment" of a major life activity. *Id.* at 20a-21a. General rules about HIV-positive status that the Court may establish in *Bragdon* will have no bearing on the present fact-specific holding.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

December 11, 1997 Respectfully submitted,

MARK SNYDERMAN
ROBERT A. BOAS
THE COCA-COLA COMPANY
P.O. Drawer 1734
Atlanta, GA 30301
(404) 676-2121

NANCY L. ABELL*
PAUL, HASTINGS, JANOFSKY &
WALKER LLP
1299 Ocean Avenue, Fifth Floor
Santa Monica, CA 90401
(310) 319-3219

Attorneys for Respondent
*Counsel of Record

MOTION FILED
DEC 11 1997

(3)

No. 97-791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT P. BURCH,

Petitioner,

vs.

THE COCA-COLA COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE, THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE AND THE ASSOCIATION OF SUBSTANCE ABUSE PROGRAMS OF TEXAS, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER

ELLEN M. WEBER
Counsel of Record
SALLY FRIEDMAN
PAUL N. SAMUELS
LEGAL ACTION CENTER
236 Massachusetts Avenue, N.E.
Suite 505
Washington, D.C. 20002
(202) 544-5478

28 pp

MOTION OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE, THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE AND THE ASSOCIATION OF SUBSTANCE ABUSE PROGRAMS OF TEXAS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37(2)(b) of the Rules of the Supreme Court of the United States, the American Society of Addiction Medicine, the National Council on Alcoholism and Drug Dependence and the Association of Substance Abuse Programs of Texas respectfully request leave to file the accompanying brief as *amici curiae* in support of Petitioner Robert P. Burch's request for a writ of certiorari. Respondent Coca-Cola, Inc. has withheld consent for the filing of this brief. Petitioner Robert Burch has consented.

Amici, which are described fully in the Interest of *Amici Curiae*, are dedicated to preventing and treating the disease at issue in this case: alcoholism. Their members are among the Nation's experts in diagnosing, treating and conducting scientific and policy research about this disease. The Fifth Circuit's decision will hinder their efforts to prevent and treat alcoholism and improve clinical, judicial and public understanding of alcoholism.

Amici can provide valuable assistance to the Court. The key issue in this case is whether the Fifth Circuit has applied the disability standard of the Americans with Disabilities Act (ADA) correctly to Mr. Burch, whose disability is alcoholism. This determination must be grounded in medical knowledge and science, which all three organizations are persuaded the Fifth Circuit has ignored. Granting *amici* leave to participate will enable them to present relevant scientific information that is necessary to understand why the Fifth Circuit's decision is wrong as a matter of science and law.

Amici are also able to apprise the Court of the far-reaching implications of the Fifth Circuit's decision, which conflicts with several other Circuits' decisions concerning alcoholism and other disabilities under the ADA, and would reverse twenty years of progress made possible by the ADA and the federal Rehabilitation Act. The legal standard adopted by the Fifth Circuit will eviscerate the ADA's protection of qualified individuals with alcohol dependence. This will hamper our Nation's efforts to treat alcohol dependence and to ensure that those who have been treated retain or find employment, which is essential to maintain sobriety. *Amici* believe that information about the substantial human and social costs that would flow from the decision below will assist the Court in deciding whether to grant certiorari.

Accordingly, the American Society of Addiction Medicine, the National Council on Alcoholism and Drug Dependence, and the Association of Substance Abuse Programs of Texas urge the Court to grant them leave to present their views.

Respectfully submitted,

ELLEN M. WEBER*
SALLY FRIEDMAN
PAUL N. SAMUELS
LEGAL ACTION CENTER
236 Massachusetts Ave, N.E., Suite 505
Washington, D.C. 20002
(202) 544-5478
Fax: (202) 544-5712

Attorneys for *Amici Curiae*

**Counsel of Record*

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	2
STATEMENT OF THE CASE	5
A. Facts	5
B. The Fifth Circuit's Decision	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THE FIFTH CIRCUIT'S LEGAL STANDARD FOR "DISABILITY" CONFLICTS WITH OTHER CIRCUITS AND IS INCONSISTENT WITH THE ADA'S TITLE I REGULATIONS	8
A. The Fifth Circuit Erred In Identifying Mr. Burch's Impairment As One Manifestation Of Alcoholism, Not The Underlying Condition	8
B. The Fifth Circuit's Legal Standard For "Substantially Limits" Is Not Supported By The Law Or Title I Regulations.	11
1. Extent of Impairment	11
2. Duration and Impact of Impairment	14
II. THE FIFTH CIRCUIT'S REASONABLE ACCOMMODATION STANDARD CREATES A CONFLICT IN THE CIRCUITS AND IS INCONSISTENT WITH THE TITLE I REGULATIONS	16

Page

III. COCA-COLA'S REFUSAL TO PERMIT MR. BURCH TO RETURN TO WORK AFTER A LEAVE OF ABSENCE MAY BE CHALLENGED AS A VIOLATION OF THE REASONABLE ACCOMMODATION REQUIREMENT 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:	Page
Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993)	17
Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997)	13, 14
Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996)	13
Homeyer v. Stanley Tulchin Assocs., Inc., 91 F.3d 959 (7th Cir. 1996)	17
Jacques v. Clean-Up Group, Inc., 96 F.3d 506 (1st Cir. 1996)	17
Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996)	14, 15
Lyons v. Legal Aid Soc'y, 68 F.3d 1512 (2d Cir. 1995)	16, 17
McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992)	17
Miller v. Runyon, 77 F.3d 189 (7th Cir. 1996)	19
Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed. Cir. 1996)	18
Riel v. Electronic Data Systems Corp., 99 F.3d 678 (5th Cir. 1996)	19
Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1997)	9
Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995)	9
Whitbeck v. Vital Signs, Inc., 116 F.3d 588 (D.C. Cir. 1997)	19

Page

Statutes:

42 U.S.C. § 12102(2) 8

42 U.S.C. § 12111(8) 14

Regulations And Other Administrative Materials:

20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.09, 11.04, 11.14 and 12.02(A)(2) (1997) 13

29 C.F.R. § 1630.2(j) 11, 12

29 C.F.R. § 1630.2(m) 14

29 C.F.R. § 1630.2(o) 17, 18

43 Op. Att'y Gen. No. 12 (1977) 16

App. to 29 C.F.R. § 1630.2 18

EEOC Compliance Manual, Definition of the Term "Disability" 11, 13-15

Other Authorities:

Drusilla Campbell & Marilyn Graham, *Drugs and Alcohol in the Workplace: A Guide for Managers*, 9 (New York: Facts on File Publications, 1988) 5

Bridget F. Grant et al., "Prevalence of DSM-IV-R Alcohol Abuse and Dependence: United States, 1992," *Alcohol Health & Research World*, Vol. 18, No. 3, 243 (1994) 4

National Institute on Alcohol Abuse and Alcoholism, *Alcohol Alert*, No. 30, Washington, D.C. (1987) 9-10, 12

	Page
Dorothy P. Rice, "The Economic Cost of Alcohol Abuse and Alcohol Dependence: 1990," *Alcohol Health & Research World*, Vol. 17, No. 1, 10 (1993)	4
Frederick S. Stinson et al., "Prevalence of DSM-III-R Alcohol Abuse and/or Dependence Among Selected Occupations, United States 1988," *Alcohol Health & Research World*, Vol. 16, No. 2, 165 (1992)	4
U.S. Department of Labor, *What Works: Workplaces Without Drugs*, 3 (August 1990)	4

No. 97-791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT P. BURCH,

Petitioner,

vs.

THE COCA-COLA COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE, THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE AND THE ASSOCIATION OF SUBSTANCE ABUSE PROGRAMS OF TEXAS, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER[1]

The American Society of Addiction Medicine, the National Council on Alcoholism and Drug Dependence, and the Association of Substance Abuse Programs of Texas respectfully submit this brief *amici curiae* in support of Petitioner's

[1] No party participated in the drafting of this brief, and counsel for *amici* funded it in total.

request for a writ of certiorari, contingent on the granting of the accompanying motion for leave, pursuant to Rule 37(2)(b). Petitioner, Robert Burch, has consented to the filing of this brief. Respondent, Coca-Cola Company, has withheld consent.

INTEREST OF *AMICI CURIAE*

This case is about whether individuals with alcohol dependence are protected against discrimination under the Americans with Disabilities Act (ADA). It began as a classic case of discrimination when Coca-Cola terminated a valued employee who took medical leave to get treatment for his alcoholism. The Fifth Circuit, which held, in part, that Mr. Burch is not disabled under the ADA, has transformed the case into an unprecedented decision that establishes incorrect legal standards and promotes a fundamentally flawed and biased understanding of the disease of alcoholism. If permitted to stand, the decision, even in its narrowest application, will eviscerate the ADA's protection of qualified individuals with alcohol problems. It could also undo workplace practices that help individuals get the care they need and remain employed and reduce the workplace, health and social costs resulting from untreated alcoholism. If applied generally, the decision will constrict the ADA's protection of all individuals with disabilities.

The American Society of Addiction Medicine (ASAM), the National Council on Alcoholism and Drug Dependence (NCADD), and the Association of Substance Abuse Programs of Texas and their members are dedicated to preventing and treating one of the Nation's most serious and costly public health problems: alcohol dependence. The anti-discrimination protections of the ADA are critical to the fight against alcoholism.

ASAM, founded in 1954, is an international association of 3,200 physicians in a wide range of medical specialties. ASAM is dedicated to improving the treatment of alcoholism and other addictions, through research, prevention, and education of the medical community and the public. ASAM is a

delegate in the American Medical Association's House of Delegates, and, in June 1990, the AMA's Board of Trustees designated addiction medicine as a practice specialty.

NCADD is a voluntary health organization with a nationwide network of affiliates. NCADD advocates for prevention, intervention, research and treatment of alcoholism and drug dependence, and pioneered efforts to establish employee assistance programs that enable employers and employees to address and resolve work-related problems stemming from these diseases. NCADD and its affiliates work to eradicate the stigma of alcoholism and educate the public that alcoholism is a complex medical condition that can and must be treated.

The Association of Substance Abuse Programs of Texas represents fifty non-profit substance abuse service organizations. Its purpose is to strengthen the quality and scope of substance abuse prevention, education, intervention and treatment for the people of Texas. The Association's members treat thousands of individuals for alcoholism each year and help them to maintain their sobriety and retain or find employment.

All three organizations have a keen interest in ensuring that the courts understand the disease of alcohol dependence and apply medical and scientific knowledge appropriately in resolving discrimination suits. As discussed below, the clinical conditions that would satisfy the Fifth Circuit's standard for finding a disability under the ADA exist in only a tiny segment of people diagnosed with alcohol dependence and never appear in those who are employed or employable. Accordingly, these organizations are very concerned about the establishment of a legal standard that is based on a flawed understanding of the disease and would exclude virtually all persons with alcohol dependence from the protections of the ADA. The Fifth Circuit's standard would deter employees from coming forward and entering treatment for fear of losing their livelihood, drive the problem underground, and increase costs to employers.

The legal protections afforded individuals with alcohol problems are important because the disease reaches into almost every corner of the American workplace. An estimated 13.8 million Americans, the vast majority of whom are employed, have alcohol problems. Approximately 8.1 million of these are alcohol dependent, and the remainder fit a diagnosis of alcohol abuse.[2] A national survey that examined the prevalence of alcohol abuse and dependence among workers in 500 occupations found that over ten percent of American workers have a problem with alcohol.[3]

Untreated alcohol abuse and dependence cost the United States approximately $98.6 billion in 1990.[4] Approximately 72 percent of these costs are associated with lost employment and reduced productivity resulting from alcohol-related death and illness.[5] Absenteeism among employees with alcoholism or drinking problems is 3.8 to 8.3 times greater than normal.[6] And the health care costs for individuals with alcoholism are

---

[2] Bridget F. Grant et al., "Prevalence of DSM-IV-R Alcohol Abuse and Dependence: United States, 1992," *Alcohol Health & Research World*, Vol. 18, No. 3, 243, 245 (1994). The diagnosis of alcohol disorders is made most commonly by using the diagnostic criteria set out in the American Psychiatric Associations' *Diagnostic and Statistical Manual of Mental Disorders* (DSM). The criteria for distinguishing alcohol abuse from alcohol dependence are described *infra* at p. 9, 10, and 12. Alcohol dependence is synonymous with alcoholism.

[3] Frederick S. Stinson et al., "Prevalence of DSM-III-R Alcohol Abuse and/or Dependence Among Selected Occupations, United States 1988," *Alcohol Health & Research World*, Vol. 16, No. 2, 165, 167-71 (1992).

[4] Dorothy P. Rice, Sc.D., "The Economic Cost of Alcohol Abuse and Alcohol Dependence: 1990," *Alcohol Health & Research World*, Vol. 17, No. 1, 10 (1993).

[5] Stinson et al., *supra*, n. 2, at 172.

[6] U.S. Department of Labor, *What Works: Workplaces Without Drugs*, 3 (August 1990).

roughly twice as high as that for those who do not have this disease.[7]

Treatment dramatically reduces alcohol-related health care and other workplace costs. A study of over 3,000 individuals who were treated for alcoholism revealed that their health care costs dropped by 23%, on average, after treatment. The study also found that over a 14-year period, the health care costs of persons who received alcoholism treatment were 24% lower than were the health costs of those who were not treated for their alcoholism. Many employers, particularly large corporations, have implemented Employee Assistance Programs to reduce workplace problems associated with untreated alcoholism and to treat, rather than terminate, employees with such problems. Many have documented the value of providing treatment.[8]

The Fifth Circuit's decision shatters the legal foundation that has made these strides possible.

STATEMENT OF THE CASE

A. Facts

Amici adopt the factual statement in Petitioner's Brief and highlight several additional facts. Mr. Burch sought inpatient alcoholism treatment after being unable, even with the assistance of outpatient counseling, to control his drinking for a year and a half. Mr. Burch's drinking affected him both on and off the job. He testified that when he became intoxicated,

---

[7] *Id.* at 149.

[8] For example, employees of the Philadelphia Police Department who received treatment reduced their sick days by an average of 38% and their injured days by 62%. Oldsmobile's Lansing, Michigan plant saw the following results in the year after its employees with alcoholism received treatment: lost work hours declined by 49%; health care costs declined by 29%; leaves declined by 56%; grievances declined by 78%; disciplinary problems declined by 63%; and accidents declined by 82%. Drusilla Campbell & Marilyn Graham, *Drugs and Alcohol in the Workplace: A Guide for Managers*, 9 (New York: Facts on File Publications, 1988).

he suffered blackouts and insomnia and lost his ability to walk, talk, think and function. While he did not drink during work hours, his drinking affected his memory and caused him to avoid interaction with co-workers in the morning. Indeed, Mr. Burch decided to enter alcoholism treatment the day after an incident at a company dinner, which opened his eyes to the seriousness of his problem. He testified that he realized that his drinking was affecting his personal life and, in his words, "the last thing I wanted it to do was have it affect my business life." (TR. 224) He sought treatment before he was informed that his conduct at the company function was being investigated.

Mr. Burch's treating physician at Charter Hospital diagnosed him as suffering from "alcohol withdrawal syndrome, alcohol dependence and possibly depression." As such, according to Dr. Nace, alcohol-induced changes to the brain had caused Mr. Burch to permanently lose control over his ability to regulate the amount of alcohol he drank, which resulted in increasingly more interpersonal conflicts. (TR. 665-66) No other medical evidence was presented at trial to refute Dr. Nace's diagnosis or his opinion that Mr. Burch fit the definition of "disabled" under the ADA.

B. The Fifth Circuit's Decision

The Fifth Circuit reversed the jury verdict for Mr. Burch. The Court held that he did not meet the ADA definition of disability, as he did not suffer from an impairment that substantially limited a major life activity, did not have a record of such an impairment, and was not perceived as having such an impairment. The Court found that while Mr. Burch's alcoholism may be permanent, it did not reach the level of severity to *substantially* limit any major life activity. The Court reasoned that Mr. Burch's condition, which it characterized as inebriation that was temporarily incapacitating, was no different than that of an overindulging social drinker who experienced impaired senses, dulled reactions, restless sleep and an unpleasant morning after drinking. Finding no difference between Mr. Burch and social drinkers, the Court went on to

identify the physical and mental conditions that an individual with alcohol dependence would have to present to satisfy the definition of disability: "alcoholism-induced inebriation that permanently altered his gait, his ability to speak properly, his memory when sober, or produced long-term insomnia." The Court cited no medical evidence to support its formulation of Mr. Burch's impairment or its list of the conditions that would render an alcoholic disabled under the ADA. It also provided no legal support for its disability standard, which requires individuals with alcoholism, at a minimum, to prove additional, permanently impairing conditions to be covered under the ADA.

The Court also held that Burch had not stated a reasonable accommodation claim because he had not demonstrated that the major life activity of "work" was substantially limited, which, according to the Court, is necessary for a such claim. Again citing no support for this legal standard, the Court reasoned that if work is not affected there is nothing to be accommodated. Only with claims of intentional discrimination, according to the Court, can an aggrieved employee rely on a major life activity other than work.

Finally, the Court held that Mr. Burch's request for a leave of absence to obtain treatment and return to work upon completion is not a "cognizable, reasonable accommodation." The Court reasoned that, because Coca-Cola permitted him to enter treatment and paid him during his absence, the only thing Mr. Burch had requested was the ability to return to his job. The Court found that, as a matter of law, Coca-Cola's refusal to permit Mr. Burch to return after his leave of absence can only be challenged as a discriminatory discharge, not as a failure to provide a reasonable accommodation.

SUMMARY OF ARGUMENT

The Fifth Circuit's unprecedented holding that Mr. Burch, an individual diagnosed with alcohol dependence, is not disabled under the ADA is based on several errors of law. First, the Court has erroneously misconstrued Mr. Burch's impairment as one manifestation of alcohol dependence —

inebriation — rather than the underlying condition. Second, in determining whether Mr. Burch's impairment is "substantially limiting," it has required that the limitations resulting from his impairment be both permanent and of such severity that secondary physical and mental conditions exist (in addition to his alcoholism). The Court's formulation amounts to a legal standard that excludes all individuals with alcoholism from the protection of the ADA; one must also have another secondary disability caused by the primary disability, alcoholism. It conflicts with other Circuit Court decisions that have analyzed the legal standard for disability in cases relating to alcohol dependence as well as other impairments.

The Court has also established an incorrect standard for stating a reasonable accommodation claim under the ADA by requiring proof that a disability substantially limits the major life activity of work rather than any other major life activity. Finally, the Court has misconstrued the accommodation of a leave of absence and has erroneously ruled that the refusal to permit an employee to return after a leave can only be challenged as intentional discrimination, not a violation of the reasonable accommodation requirement.

ARGUMENT

I. THE FIFTH CIRCUIT'S LEGAL STANDARD FOR "DISABILITY" CONFLICTS WITH OTHER CIRCUITS AND IS INCONSISTENT WITH THE ADA'S TITLE I REGULATIONS

A. The Fifth Circuit Erred In Identifying Mr. Burch's Impairment As One Manifestation Of Alcoholism, Not The Underlying Condition.

The Fifth Circuit made several legal errors in holding that Mr. Burch does not meet the ADA definition of "disability" (42 U.S.C. § 12102(2)). First, the Court misconstrued the very nature of Mr. Burch's disability by focusing on the most apparent manifestation of alcoholism — inebriation — and recasting his impairment as nothing more than temporary

episodes of inebriation. Other Circuit Courts have explicitly rejected this approach.

For example, the Sixth Circuit in *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1997), reversed the district court's ruling that an employee who had a bladder condition that caused intermittent bladder infections was not an individual with a disability. The Sixth Circuit found that the lower court had erred in analyzing whether a disability existed because, "[i]nstead of considering whether plaintiff's bladder condition constitutes a disability, the District Court considered only whether her bladder infections constitute a disability." *Id.* at 844. Since the bladder infections are a characteristic manifestation of the particular impairment, they are a part of the underlying impairment and should not be considered separately. The Sixth Circuit remanded the case for a determination of whether the bladder condition substantially limited plaintiff's major life activities. Similarly, in *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995), the Seventh Circuit held that an employer had a duty to reasonably accommodate plaintiff's pressure ulcers because they were a part of her disability of paralysis. The Court rejected defendant's assertion that because the pressure ulcers were intermittent and episodic, and, thus, outside the definition of disability, they did not have to be accommodated. The Court noted that "[o]ften the disabling aspect of a disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment." *Id.* at 544.

In this case, the Fifth Circuit missed the forest — an unrebutted medical diagnosis of alcohol dependence — for the trees. A diagnosis of alcohol dependence means that Mr. Burch had a pattern of drinking — not singular and temporary episodes — that satisfied at least three of the following criteria:

> (1) tolerance, which is the need for markedly increased amounts of alcohol to achieve intoxication or the desired effect, or diminished effect with the continued use of the same amount of alcohol;

> (2) withdrawal, exhibited by withdrawal symptoms and consuming alcohol to avoid or relieve such symptoms;
>
> (3) impaired control as exhibited by the persistent desire or one or more unsuccessful efforts to control drinking and drinking larger amounts or over a longer period of time than intended;
>
> (4) neglect of important social, occupational, or recreational activities because of drinking;
>
> (5) a great deal of time devoted to obtaining alcohol, drinking and recovering from its effects;
>
> (6) inability to fulfill role obligations at work, school or home;
>
> (7) hazardous use of alcohol;
>
> (8) continued drinking despite knowledge of having persistent or recurring social, psychological or physical problems caused by alcohol use; and
>
> (9) some symptoms have persisted for at least one month or have occurred repeatedly over a longer period.[9]

It is this constellation of symptoms that must be examined to determine whether Mr. Burch was substantially limited in any major life activity.

---

[9] National Institute on Alcohol Abuse and Alcoholism, *Alcohol Alert*, No. 30, Washington, D.C. (1987), citing the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised* (DSM-III-R), which was the standard diagnostic tool at the time of Mr. Burch's diagnosis.

B. The Fifth Circuit's Legal Standard For "Substantially Limits" Is Not Supported By The Law Or Title I Regulations.

The regulatory definition of "substantially limits"[10] requires an examination of the extent, duration and impact of the impairment. EEOC Compliance Manual, Definition of the Term "Disability," § 902.4(b). The Fifth Circuit erred in three ways when making this determination.

1. *Extent of Impairment*

First, in evaluating the extent of Mr. Burch's impairment, the Court selected the wrong comparison group to analyze whether his condition was severe enough to set him apart from the average person. The regulatory definition of "substantially limits" requires a comparison between the way an individual with an impairment performs versus the "average person in the general population." 29 C.F.R.

---

[10] The term "substantially limits" means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
>
> (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j).

§ 1630.2(j)(1). The Court, however, did not compare Mr. Burch to the average person, but rather to a segment of the population that drinks to the point of inebriation. If this standard were generally adopted, it would require a comparison of the individual with an impairment to others who share the same defining characteristic of that impairment. Thus, for example, a person with a mobility impairment would have to be compared to those in the public who have broken legs and cannot walk temporarily; a person with hemophilia would have to be compared to individuals who are experiencing internal bleeding; an individual with severe depression would have to be compared to individuals who are experiencing temporary depression. This would lead to absurd and unintended results; no one would be able to demonstrate that a condition is substantially limiting because all would be experiencing the exact same effects.

As a factual matter in this case, Mr. Burch's diagnosis distinguishes him from one who abuses alcohol[11] and one who occasionally gets drunk but has no alcohol problem, like the Court's social drinker. Clearly, Mr. Burch is not like the average person, much less every other drinker.

The Court's second error of law was to require, as proof of severity, the existence of secondary impairments beyond alcohol dependence; *i.e.*, permanently altered gait, speech, memory or sleeping disorders. According to physicians who treat alcoholism, these conditions appear very rarely in individuals with alcohol dependence — on the order of 2 out of

---

[11] The DSM-III-R criteria for alcohol abuse are (1) a maladaptive pattern of alcohol use indicated by either continued use despite the knowledge of having persistent or recurrent social, occupational, psychological or physical problem that is caused by alcohol use or drinking in hazardous situations; (2) some symptoms have persisted for at least one month or have occurred repeatedly over a longer time period; and (3) never met the criteria for alcohol dependence. National Institute on Alcohol Abuse and Alcoholism, *Alcohol Alert*, No. 30, Washington, D.C. (1987), citing the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised.*

every 1,000 cases — and only in those whose alcoholism has gone untreated for a very long time. Individuals who are employed or employable do not have these conditions. The gait, memory and speech problems result from severe central nervous system damage, due primarily to thiamine deficiency,[12] and are often reversible with treatment. The Court's formulation defines the sickest of the sick and appears to have been taken from the Supplemental Security Income eligibility standards, 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.09, 11.04, 11.14 and 12.02(A)(2) (1997), which are totally inapplicable in ADA cases.

The regulations do not require that an impairment be at its most severe stage, causing secondary impairments. According to the EEOC, the key is whether the impairment "significantly restricts" life activities (EEOC Compliance Manual, § 902.4(c)(1)), not whether it renders the individual completely unable to engage in a life activity. Other Circuit Courts have clearly rejected the Fifth Circuit's standard by finding that individuals with chronic medical conditions meet the definition of disability even when they receive treatment to prevent severe health and other consequences. For example, in *Harris v. H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996), the Eleventh Circuit held that a woman with Graves' disease, whose condition was completely controlled by medication, had raised a genuine issue of material fact as to whether she was substantially limited in a major life activity. The Court concluded that the evidence demonstrated that without medication, the woman could suffer numerous severe consequences, including lapsing into coma and death. Proof of what could occur absent mitigating measures was sufficient, rather than evidence that the individual had suffered these consequences. *Id.* at 523. Similarly, the Sixth Circuit held in *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997), that a paramedic whose diabetes was controlled by medication and proper diet had put forward sufficient

---

[12] The Court's other condition, long-term insomnia, is not even recognized as a symptom of alcoholism.

evidence to withstand summary judgment, because without medication his condition had caused him to become frustrated, irritable and rude. The Sixth Circuit concluded that this could prevent him from getting along with co-workers, and thereby substantially limit his ability to work. *Id.* at 762-65.

Under the Fifth Circuit's standard, virtually no individual with alcoholism would meet the definition of disability. Even if one did, he or she would not be a "qualified individual with a disability," *i.e.*, able to perform the essential functions of a job either with or without a reasonable accommodation. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). Similarly, individuals with other disabilities would not meet the definition of disability unless their conditions had progressed to the most severe stage. An individual with diabetes would have to experience blindness or organ failure to be protected under the ADA. Congress clearly did not have this in mind in enacting the ADA.

2. *Duration and Impact of Impairment*

Finally, in determining the duration and impact of the impairment, the Fifth Circuit held that the limitations must be "permanent" to be substantially limiting. Other Circuit Courts, the Title I regulations and the EEOC have rejected this legal standard. For example, in *Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996), the First Circuit considered whether a heart condition was of sufficient duration and impact to be substantially limiting. The Court adopted the standard set forth in the EEOC's Compliance Manual,[13] finding

---

[13] The Compliance Manual states:

> Although short-term, temporary restrictions generally are not substantially limiting, an impairment *does not necessarily have to be permanent to rise to the level of a disability*. Some conditions may be long-term or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.

(Footnote continued)

that a jury must determine whether the "limitations [on major life activities] were permanent *or persisted on a long-term basis, or that their duration was indefinite and unknowable or expected to be at least several months*." *Id.* at 32 (emphasis added).

The Fifth Circuit's standard is also incompatible with the coverage of chronic conditions that have episodic, active stages. As the EEOC has explained:

> [S]ome chronic conditions may constitute substantially limiting impairments. Such conditions may be substantially limiting when active or may have a high likelihood of recurrence in substantially limiting forms....Some severe back problems and most forms of heart disease and cancer fall into this category. This category also includes illnesses, such as tuberculosis, that may lay dormant for long periods but can reemerge at any time in a substantially limiting manner. Similarly, episodic disorders, such as bipolar disorder, which remit and then intensify also fall into this category.

EEOC Compliance Manual, § 902.4(d). The evidence in this case demonstrates that the active phase of alcoholism for which Mr. Burch sought treatment lasted for over one and one-half years, and that alcoholism itself is a permanent condition that has a life-long impact on Mr. Burch. If Mr. Burch were to begin drinking alcohol again, he would suffer the same debilitating consequences that affected his ability to function.

In sum, the Fifth Circuit's restrictive standard stands in stark contrast to every other Circuit Court decision that has considered whether an individual with alcoholism is disabled under the Rehabilitation Act or ADA. *See* Petitioner's Brief at 17-18. None has required permanent impairments beyond the

---

EEOC Compliance Manual, Definition of the Term "Disability," § 902.4(d) (emphasis added).

diagnosis of alcohol dependence. It also conflicts with the policy considerations articulated in 1977 by then-Attorney General Griffen Bell who concluded that alcoholics are "handicapped individuals" within the meaning of the Rehabilitation Act of 1973, as amended.

> [I]t is consistent with Congress' obvious purpose to prohibit discrimination against otherwise qualified individuals solely on the basis of an illness or other handicap to include alcoholism...within the statute's reach. The Supreme Court took note in *Powell v. Texas* of the "shame which we have associated with alcoholism,"...and observed that "the uncharitable attitude of our society toward alcoholics causes many of them to refrain from seeking treatment from any source."

43 Op. Att'y Gen. No. 12 at 12 (1977). Mr. Burch's experience clearly demonstrates that protection against discrimination is as necessary today as it was twenty years ago.

II. THE FIFTH CIRCUIT'S REASONABLE ACCOMMODATION STANDARD CREATES A CONFLICT IN THE CIRCUITS AND IS INCONSISTENT WITH THE TITLE I REGULATIONS

The Fifth Circuit also established a new legal standard for stating a reasonable accommodation claim, which conflicts with the law in at least four other Circuits and with the EEOC regulations and interpretative guidance. Under the Court's formulation, an individual who seeks a reasonable accommodation must demonstrate that the major life activity of working is substantially limited. This standard incorrectly merges the reasonable accommodation obligation with the definition of disability. If the Fifth Circuit's decision stands, a substantial number of people with a broad array of disabilities will be denied accommodations they are entitled to under the ADA.

At least four Circuit Courts have found that an employer has a duty to accommodate an impairment even when it does not limit the activity of working. In *Lyons v. Legal Aid Soc'y*,

68 F.3d 1512 (2d Cir. 1995), for example, a plaintiff who relied on walking devices claimed that her employer failed to accommodate her disability by refusing to provide a parking space near her office. Even though her impairment substantially limited her ability to walk, not to work, the Second Circuit held that plaintiff stated a claim and that the requested accommodation was not unreasonable as a matter of law. *Id.* at 1515. The court held that requiring an employer to provide a qualified person with a disability assistance in getting to work was consistent with Congress' views and those of the EEOC. *Id.* at 1517. The EEOC has included the provision of reserved parking spaces as an example of a possible required accommodation. *Id.* at 1515 (*citing* EEOC Interpretive Guidance at 407).

The First Circuit reached the same conclusion in *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506 (1st Cir. 1996), where a plaintiff whose epilepsy prevented him from driving claimed that his employer failed to accommodate his disability by not providing transportation to work. Though the First Circuit affirmed the district court's denial of plaintiff's claim, it held that employers are not relieved of the duty to accommodate merely because a qualified employee is able to perform a job's essential functions. Rather, employers must provide accommodations "to allow equal enjoyment of employment privileges and benefits or to pursue therapy or treatment." *Id.* at 515, n.9.

The Seventh and Ninth Circuits have reached the same conclusion in both ADA and Rehabilitation Act cases. *See Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959 (7th Cir. 1996); *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992); and *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993). *See* discussion in Petitioner's Brief at 23-26.

The *Burch* Court's interpretation also contradicts the plain language of the EEOC's implementing regulations and interpretative guidance. The regulations do not limit reasonable accommodations to those that enable the individual to perform the essential functions of the job (29 C.F.R.

§ 1630.2(o)(ii)), but rather include accommodations "that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(iii). As an example of such an accommodation, the interpretative guidance suggests the "use of accrued paid leave or providing additional unpaid leave for necessary treatment...." App. to 29 C.F.R. § 1630.2(o).

The interpretive guidance further provides that "[i]f an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." App. to 29 C.F.R. § 1630.2(j). Nowhere do the regulations or interpretation provide that this provision only applies to intentional discrimination claims.

The *Burch* court's unprecedented holding rests on the faulty premise that an employer would have nothing to accommodate if the ability to work were not limited. Under this rationale, employers would not need to build ramps, provide accessible toilets, or modify work schedules because such accommodations do not address a work-related impairment. Clearly, the ADA does not limit the reasonable accommodation requirement to individuals with impairments that substantially limit their ability to work.

III. COCA-COLA'S REFUSAL TO PERMIT MR. BURCH TO RETURN TO WORK AFTER A LEAVE OF ABSENCE MAY BE CHALLENGED AS A VIOLATION OF THE REASONABLE ACCOMMODATION REQUIREMENT

For individuals who are alcohol dependent, a leave of absence to obtain treatment is often necessary and, as noted above, is certainly the type of job modification that is contemplated under the ADA. As the Court noted in *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996), "Treatment would seem to be essential to any accommodation for alcoholism." Yet, the Fifth Circuit's strained formulation of leave,

i.e., coming back to work is not a component of a medical leave, renders this accommodation meaningless. No employee would request a medical leave for any disability, if there were no guarantee that he or she could return to work after treatment.

As a matter of law, nothing in the ADA precludes Mr. Burch from challenging Coca-Cola's refusal to let him return from leave as a violation of the reasonable accommodation requirement. While Coca-Cola's actions may be more easily understood as a discriminatory discharge, that does not mean that Coca-Cola did not also violate its statutory duty to provide a reasonable accommodation. There is no accommodation if the leave is cut short through suspension or discharge. This is no different than a claim against an employer who, when faced with a request for an accommodation, fires the employee instead. In such cases, a reasonable accommodation claim exists. *See e.g.*, *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997) (sales representative with a spinal cord tumor whose employer terminated her after refusing her accommodation request to use a motorized cart states a reasonable accommodation claim); *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996) (engineer with renal condition who was discharged after requesting a reasonable accommodation stated a reasonable accommodation claim); and *Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996) (employee's claim that the Postal Service violated its obligation to provide reasonable accommodation, when it refused his transfer request and terminated him, has merit under the Rehabilitation Act).

Similarly, in this case, Mr. Burch is entitled to challenge Coca-Cola's refusal to provide a leave of absence as a violation of the reasonable accommodation requirement.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the decision of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

ELLEN M. WEBER*
SALLY FRIEDMAN
PAUL N. SAMUELS
LEGAL ACTION CENTER
236 Massachusetts Avenue, N.E., Suite 505
Washington, D.C. 20002
(202) 544-5478
Fax: (202) 544-5712

Attorneys for *Amici Curiae*

**Counsel of Record*

Dated: Washington, D.C.
December 11, 1997